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BY JOHN F. JOHNSON

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COMMENTARIES

ON

The Laws of England:

IN FOUR BOOKS;

WITH

AN ANALYSIS OF THE WORK.

BY

SIR WILLIAM BLACKSTONE, KNT.

ONE OF THE

JUSTICES OF THE COURT OF COMMON PLEAS.

VOL. II.

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WITH THE LAST CORRECTIONS OF THE AUTHOR, AND COPIOUS
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BY J. E. HOVENDEN, ESQ.

OF GRAY'S INN, BARRISTER AT LAW.

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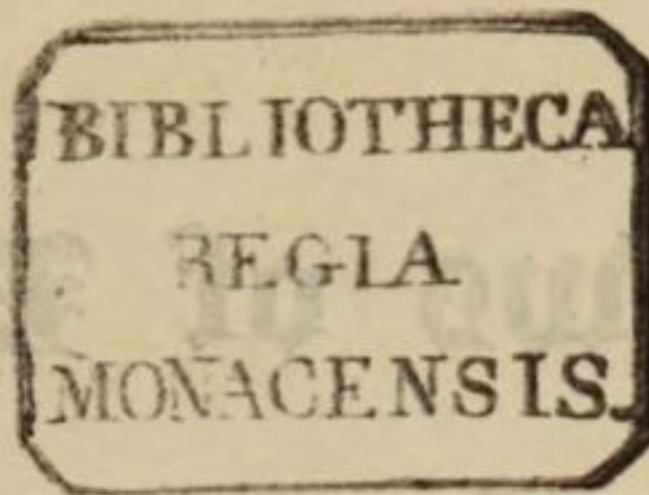
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ANALYSIS

OF

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OF THE RIGHTS OF THINGS.

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10. A grant is the regular method, by common law, of conveying incorporeal hereditaments . . . 317

11. A lease is the demise, granting, or letting to farm of any tenement, usually for a less term than the lessor hath therein: yet sometimes possibly for a greater; according to the regulations of the restraining and enabling statutes . . . 317

12. An exchange is the mutual conveyance of equal interests, the one in consideration of the other . . . 323

13. A partition is the division of an estate held in joint-tenancy, in co-parcenary, or in common, between the respective tenants; so that each may hold his distinct part in severalty . . . 323

14. A release is the discharge or conveyance of a man's right, in lands and tenements, to another that hath some former estate in possession therein . . . 324

15. A confirmation is the conveyance of an estate or right *in esse*, whereby a voidable estate is made sure, or a particular estate is increased . . . 325

16. A surrender is the yielding up of an estate for life, or years, to him that hath the immediate remainder or reversion; wherein the particular estate may merge . . . 326

17. An assignment is the transfer, or making over to another, of the whole right one has in any estate; but usually in a lease, for life or years . . . 326

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20. The statute of uses, having transferred all uses into actual possession (or, rather, having drawn the possession to the use), has given birth to divers other species of conveyance: I. A covenant to stand seised to uses. II. A bargain and sale, enrolled. III. A lease and release. IV. A deed to lead or declare the use of other more direct conveyances. V. A revocation of uses; being the execution of a power, reserved at the creation of the use, of recalling at a future time the use or estate so creating.

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7. Bailment is the delivery of goods in trust ; upon a contract, express or implied, that the trust shall be faithfully performed by the bailee 451

8. Hiring or borrowing is a contract, whereby the possession of chattels is transferred for a particular time, on condition that the identical goods (or, sometimes, their value) be restored at the time appointed ; together with (in case of hiring) a stipend or price for the use 453

9. This price, being calculated to answer the hazard, as well as inconvenience, of lending, gives birth to the doctrine of interest or usury, upon loans ; and, consequently, to the doctrine of bottomry or *respondentia*, and insurance 453—464

10. Debt is any contract, whereby a certain sum of money becomes due to the creditor. This is, I. A debt of record. II. A debt upon special contract. III. A debt upon simple contract ; which last includes paper credit, or bills of exchange, and promissory notes 464—470

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4. A trader who endeavours to avoid his creditors, or evade their just demands, by any of the ways specified in the several statutes of bankruptcy, doth thereby commit a bankruptcy 478
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2. Testaments have subsisted in England immemorially; whereby the deceased was at liberty to dispose of his personal estate, reserving anciently to his wife and children their reasonable part of his effects 491
3. The goods of intestates belonged anciently to the king; who granted them to the prelates to be disposed in pious uses: but, on their abuse of this trust, in the times of popery, the legislature compelled them to delegate their power to administrators expressly provided by law 493

4. All persons may make a testament, unless disabled by, I. Want of discretion. II. Want of free will. III. Criminal conduct Page 496-7

5. Testaments are the legal declaration of a man's intentions, which he wills to be performed after his death. These are, I. Written. II. Nuncupative 499, 500

6. An executor is he, to whom a man by his will commits the execution thereof 502

7. Administrators are, I. *Durante minore ætate* of an infant executor or administrator; or *durante absentia*; or *pendente lite*. II. *Cum testamento annexo*; when no executor is named, or the executor refuses to act. III. General administrators; in pursuance of the statutes of Edward III. and Henry VIII. IV. Administrators *de bonis non*; when a former executor or administrator dies without completing his trust 503—507

8. The office and duty of executors (and, in many points, of administrators also) are, I. To bury the deceased. II. To prove the will, or take out administration. III. To make an inventory. IV. To collect the goods and chattels. V. To pay debts; observing the rules of priority. VI. To pay legacies, either general or specific; if they be vested, and not lapsed. VII. To distribute the undivided surplus, according to the statute of distributions 508—520

CORRIGENDA.

Page 72, n. 19, *dele* the two last lines.

Vol. II. p. 185, n. column 3, lines 15 and 16, for "*is*" read "*was*;" and line 19, for "*concludes*" read "*concluded*;" line 9, column 4, for "*is*" read "*was*."

COMMENTARIES
ON
THE LAWS OF ENGLAND.

BOOK THE SECOND.
OF THE RIGHTS OF THINGS.

CHAPTER I.
OF PROPERTY IN GENERAL.

THE former book of these Commentaries having treated at large of the *jura personarum*, or such rights (1) and duties as are annexed to the persons of men, the objects of our inquiry in this second book will be the *jura rerum*, or, *those rights which a man may acquire in and to such external things as are unconnected with his person*. These are what the writers on natural law style the rights of dominion, or property; concerning the nature and original

Rights of things,
or rights of do-
minion.

(1) The Latin word *jus*, one primary signification of which is held to be properly expressed by our English word *right*, is "an equivocal term, standing for many senses, according to its different use. Some lawyers reckon up near forty; whence it follows that Justinian and his lawyers,

who begin their works with definition, would have done better if they had proceeded *more philosophico*, and had distinguished before they defined." (Elem. Civ. L. 40.) If the observation just cited from Dr. Taylor be sound, it must be strictly applicable here.

of which I shall first premise a few observations, before I proceed to distribute and consider its several objects.

Their origin.

[*2].

*There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. And yet there are very few, that will give themselves the trouble to consider the original and foundation of this right (2). Pleased as we are with the possession,

(2) Our author himself instructs us, in the subsequent pages of this chapter, that the *right* or *rule* which assigns to an individual *exclusive* dominion over particular possessions, is not to be inferred in every instance by the same process of reasoning. He tells us, that "when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of permanent dominion, and to appropriate to individuals not the immediate use only, but the very substance of the thing to be used. Otherwise innumerable tumults must have arisen, and the good order of the world must have been continually broken and disturbed." Again, he says with respect to moveables, that "bodily labour, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein." Subsequently he tells us, "agriculture, by a regular connexion and consequence, introduced and established the idea of a more permanent property in the soil than had hitherto been received and adopted. Had not a separate property in lands as well as moveables been vested in some individuals, the world must have continued a forest, and men have been mere animals of prey." He then repeats, that "necessity begat property," and adds, that "although the writers on natural law have arrived at the same result by various courses, still, it is agreed upon all hands, that occupancy gave the original right to the

permanent property in the substance of the earth itself, which excludes every one else but the owner from the use of it." Further on, he tells us, "the permanent right of property is no natural, but merely a civil, right:" and, shortly afterwards, he says, "rights of inheritance and successions are all of them creatures of the civil or municipal laws;" and, adverting to the power of those laws in regulating the succession to property, he intimates, "how futile every claim must be, that has not its foundation in the positive rules of the state." Again, in cap. 16, p. 258, he tells us, "occupancy is the true foundation of all property, or of holding things in severalty, which by the law of nature were common to all mankind;" but, in the next following page, he talks of "recurring to first principles, and calling in the law of nature to ascertain the property of land," when municipal laws do not define the ownership. So, in p. 392, he speaks of "property by the law of nature."

Whether there be, or not, any discrepancy between the assertions, that "occupancy gave the original right to permanent property," and the declaration, that "the permanent right of property is no natural, but merely a civil, right," it might be captious to discuss, did not that passage in the text, which gives occasion to this note, seem to invite the inquiry. Occupancy, in a state of established society, is, no doubt, governed by civil

we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best

or municipal laws; but, the claim to permanent property, by reason of the first occupancy thereof, appears to have been derived, originally, from natural right. Blackstone himself says, that, "in the case of habitations in particular, it was natural to observe, that even the brute creation, to whom every thing else was in common, maintained a kind of permanent property in their dwellings; that the birds of the air had nests, and the beasts of the field had caverns, the invasion of which they esteemed a very flagrant injustice, and would sacrifice their lives to preserve them." Necessity is not a bad argument to support an inference of natural right. But our author, as we have seen, agrees with Heineccius, (who, as to this matter follows all other writers on natural law, and in the 9th chapter of his first book informs us,) that absolute private property was introduced, and negative community of things abolished, by necessity itself. Heineccius also maintains the right of any one to appropriate to himself whatever previously belonged to no other person; and his commentator adds, "that thing ceases to be no one's, which I, by personal occupancy, have manifested an intention of applying to my own uses, in the exercise of the right granted to me by God; and he certainly injures me who interferes with my possession." No one disputes, what Locke has laid down (in his *Treat. on Gov.* book 2, cap. 5, parag. 50,) that, "in governments, the laws regulate the right of property, and the possession of land is determined by positive constitutions," but the same authority tells us, (in cap. 11, sect. 135,) "The obligations of nature cease not in society, but only in many cases are drawn closer, and have by human laws known penalties annexed to them, to enforce their observation.

Thus, the law of nature stands as an eternal rule to all men, legislators as well as others. The rules that they make for other men's actions must be conformable to the law of nature; *i. e.* to the will of God, of which that law is a declaration."

It follows then, if, in conformity to the law of nature *declaratory of the will of God*, occupancy really was, as Blackstone informs us all authorities agree it was, the first foundation of the right (or rule) of property; notwithstanding that original right may have been qualified by municipal regulations, it is not "*merely* a civil right." And see the 1st volume of these Commentaries, p. 138, where our author distinctly admits that, "the original of private property is *probably founded in nature*." If so, its infringement must be an offence against natural, as well as against social rights. And, indeed, our author (in Vol. I. p. 54,) after telling us that "the rights, which God *and nature* have established, need not the aid of human laws to be more effectually invested in every man than they are," and adding that, "neither do divine or *natural* duties receive any stronger sanction from being declared to be duties by the law of the land," subjoins, "the case is the same as to crimes and misdemeanors that are forbidden by the superior laws, and therefore styled *mala in se*, such as murder, *theft*, and perjury; which contract no additional turpitude from being declared unlawful by the inferior legislature: for that legislature in all these cases acts only in subordination to the great law-giver, transcribing and publishing his precepts." So Stillingfleet, (in the 3rd vol. of his collected works, p. 614, fol. edit.) speaking of the origin of "particular property," says, "the law of nature did not prescribe the way and method of partition, but left that

we rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which

to occupancy or compact;" but he adds, "although this division of property was not made by any antecedent law, yet being once made, and so useful to mankind, the violation of it, by taking that which is another's right, is a manifest violation of the law of nature."

Still, it is clear, rights of property were not promulgated, with respect to all "the external things of the world," at one and the same time. The general dominion of man over the whole, no doubt, has its original and foundation solely in the declared, or reasonably inferred, will of God; and, "of the things which God has provided for the use of all, he has of consequence, so long as they remain in common, given each man leave to take what he wants;" but, whenever it would defeat the purposes for which the general dominion was given, if no one were allowed to appropriate to his own use certain productions, whether entirely natural or partly made by art or obtained by labour; in all such cases, the right of sole property may be fairly understood to be implied in the general declaration of the divine will.

Rights of property, then, may be referred, ultimately, to a divine origin, and finally traced back to the only true source of all dominion; but these rights have been differently modified in different stages of society, and have been called into operation with reference to different objects at several times, as occasion required.

"The first objects of property," (says Paley, *Mor. and Pol. Phil.* book 3, cap. 3, following in the main, but with some qualifications, the doctrine of Locke, who had himself been preceded in the same safe track by earlier investigators,) "the first objects of property were the fruits which a man gathered, and the wild animals which he caught; next to these, the tents or

houses which he built, the tools he made use of to catch or prepare food; and afterwards weapons of war and offence. Many of the savage nations of North America have advanced no farther than this yet. Flocks and herds of tame animals soon became property. As the world was peopled in the East, where there existed a great scarcity of water, wells probably were next made property. Land, which is now so important a part of property, and which alone our laws call real property, was probably not made property in any country, till long after the institution of many other species of property. There are no traces of property in land in Cæsar's account of Britain; little of it in the history of the Jewish Patriarchs; none of it found amongst the (aboriginal) nations of North America. The Scythians are expressly said to have appropriated their cattle and houses, but to have left their land in common." (See further instances of the same kind noticed by Turnbull in his comment upon Heineccius, book 1, c. 9, s. 237.) In his fourth chapter of the same book, Paley observes, "there is a difficulty in explaining the origin of property in land, consistently with the law of nature; for the land was once, no doubt, common; and the question is, how any particular part of it could justly be taken out of the common, and so appropriated to the first owner, as to give him a better right to it than others; and, what is more, to exclude all others from it."

He proceeds to say, that, even "if any of the different accounts given of this matter by moralists were perfectly unexceptionable, they would none of them avail us in vindicating our present claims of property in land, unless it were more probable than it is, that our estates were actually acquired, at first, in some of the ways which those

those laws have been built. We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying owner; not caring to reflect that (accurately and strictly speaking) there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land (3); why the son should have

accounts suppose; and that a regular regard had been paid to justice, in every successive transmission of them since: for, if one link in the chain fail, every title posterior to it falls to the ground. The real foundation of our right (he asserts) is the law of the land."

The terms of the sentence last quoted might, if they stood alone and unexplained, lead to a conclusion that Paley admitted no ulterior foundation of the rules of property in land, beyond the municipal regulations of particular governments; but, all ambiguity is removed by the unequivocal explanation which he immediately subjoins, as follows:—"It is the intention of God, that the produce of the earth be applied to the use of man: this intention cannot be fulfilled without establishing property: it is consistent therefore with his will, that property be established. The land cannot be divided into separate property, without leaving it to the law of the country to regulate that division: it is consistent therefore with the same will, that the law should regulate the division; and consequently *consistent with the will of God, or right*, that I should possess that share which those regulations assign me. By whatever circuitous train of reasoning you attempt to derive *this right*, it *must terminate* at last *in the will of God*, the straightest, therefore, and shortest way of arriving at this will is the best."

No one familiar with Paley's mode of reasoning will suspect him, in any instance, of laying himself open to the sarcastic observation of a shrewd controversialist, to the following purport; namely, that short cuts to final causes

save philosophers a world of trouble, but do not remove the intermediate obstacles out of the way of their disciples. Paley was not less aware than Bacon was before him, that, upon abstruse questions, involving the consideration of original principles, no conclusion can be made safe, unless by the aid of a chain of inductive reasoning, connecting, by firmly united links, known effects with their proximate causes, and these again with their ulterior causes; and that, without demonstration of the necessary connexion of the whole series, "*investigatio causarum sterilis est.*" But, it is one thing to take the straightest and shortest way of arriving at a goal, by leaping over interposing obstacles, leaving them still to interrupt all followers; and another, and very different thing, to clear away all impediments, which might prevent others from finding the shortest road the most safe and practicable. The latter is the method which Locke, Paley, and other writers of their stamp, have successfully pursued; and by which they have traced all rights of property, from their proximate declaration by municipal regulations, to their original foundation, the divine will. See *ante*, the note to Vol. I. p. 122, and *post*, the note to p. 10.

(3) Few persons, probably, do imagine that there is any "foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land;" most persons, it is believed, look upon all parchment instruments and deeds of conveyance, merely in the light in which our author, a few pages hence, inti-

a right to exclude his fellow-creatures from a determinate spot of ground, because his father had done so before him (4): or why the occupier of a particular field or of a jewel, when lying on his death-bed, and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him (5). These inquiries, it must be owned, would be useless and even troublesome in common life. It is well if the mass of mankind will obey the laws when made, without scrutinizing too nicely into the reasons of making them. But, when law is to be considered not only as matter of practice, but also as a rational science, it cannot be improper or useless to examine more deeply the rudiments and grounds of these positive constitutions of society (6).

Founded in the
will of the Cre-
ator.

[* 3]

In the beginning of the world, we are informed by holy writ, the all-bountiful Creator gave to man "dominion over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth(a)." *This is the only true and solid foundation of man's dominion over external things(7), whatever

(a) Gen. i. 28.

mates that they ought to be considered; that is to say, as *evidences of certain facts*, establishing a legal title. If they "care to reflect" upon those facts, the right which the municipal law gives may generally, by going deep enough, be traced to some "foundation in natural law."

(4) See *post*, the note to p. 11.

(5) See the note last referred to.

(6) It is not merely in a scientific point of view, that the consideration recommended in the text is useful. All legal obligations are likely to be held more sacred, and to obtain more willing obedience, if the principles upon which they rest are clearly understood, and they are known to derive their authority not solely from positive institutions, but are seen to be founded on a basis of natural justice.

(7) "God," says the Psalmist, "has given the earth to the children of men." Psalm cxv. 16. Locke (in

his *Treat. on Gov.* book i. c. 9, parag. 86) states the case thus: "God having made man, and planted in him, as in all other animals, a strong desire of self-preservation, and furnished the world with things fit for food and raiment, and other necessities of life:—God, I say, having made man and the world thus, spoke to him,—that is, directed him by his senses and reason, as he did the inferior animals by their instinct. . . . And therefore I doubt not but before the words in Genesis i. 28, 29, were pronounced, (if they must be understood literally to have been spoken,) and without any such verbal donation, man had a right to an use of the creatures, by the will and grant of God: for the desire, strong desire, of preserving his life and being, having been planted in him as a principle of action by God himself, reason 'which was the voice of God in him,' could not but teach him and assure him, that by pursuing the

airy metaphysical notions may have been started by fanciful writers upon this subject (8). The earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator. And, while the earth continued bare of inhabitants, it is reasonable to suppose that all was in common among them, and that every one took from the public stock to his own use such things as his immediate necessities required (9).

Who gave all things in common to mankind.

These general notions of property were then sufficient to answer all the purposes of human life; and might perhaps still have answered them, had it been possible for mankind to have remained in a state of primeval simplicity: as may be collected from the manners of many American nations when first discovered by the Europeans; and from the antient method of living among the first Europeans themselves (10), if we may credit either the memorials of them preserved in the golden age of the poets, or the uniform accounts given by historians of those times, wherein "*erant omnia communia et indivisa omnibus, veluti unum cunctis patrimonium*

natural inclination he had to preserve his being, he followed the will of his maker, and therefore had a right to make use of those creatures, which by his reason or senses he could discover would be serviceable thereunto. And thus man's property in the creatures was founded upon the right he had to make use of those things that were necessary or useful to his being." And, in parag. 92, he adds, "Property, whose original is from the right a man has to use any of the inferior creatures for the subsistence and comfort of his life, is for the benefit and sole advantage of the proprietor; so that he may even destroy the thing that he has property in, when need requires." Puffendorf holds similar doctrines, in the 3rd chapter of his fourth book; as does Heineccius in the 12th chapter of his first book.

(8) That the will of the Almighty is the ultimate source of all dominion, seems an identical proposition; and, (atheism or paganism apart,) that all power must be finally referred to the permission of God, appears to

be a truism admitting no argument. We know not, however, to what "fanciful writers" Blackstone meant to allude: possibly to some whose "airy" dreams have not come down to us, and whose fancies would not be worth recovering. It is not to be supposed, that our author meant to throw a slur upon metaphysical reasoners indiscriminately: he could not be ignorant, that "all general reasoning, all politics, law, morality and divinity, are merely metaphysic." *Div. of Purl.* ii. c. 4.

(9) The reason and foundation of Adam's property, gave the same title on the same ground to all his children: every man had a *right* (*i. e.* a rule implied in consistency with the will of God, see the note to Vol. I. p. 122, and the last preceding note but one,) to the use of the inferior creatures, by the same title Adam had; namely, by the right every one had to take care of and provide for his own subsistence: and thus men had a right in common.

(10) See *ante*, note (2).

Communion of goods in the earliest ages confined to the *substance* of the thing, never extended to the *use*.

[* 4]

But necessity caused not only the *use* but the *substance* also to be appropriated to individuals.

eset (b)." Not that this communion of goods seems ever to have been applicable, even in the earliest ages, to ought but the *substance* of the thing; nor could it be extended to the *use* of it. For, by the law of nature and reason, he, who first began to use it, acquired therein a kind of transient property, that lasted so long as he was using it, and no longer (c): or, to speak with greater precision, the *right* of possession continued for the same time only that the *act* of possession lasted. Thus the ground was in common, and no part of it was the permanent property of any man in particular; yet whoever was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust, and contrary to the law of nature, to have driven him by force: but the instant that he quitted* the use or occupation of it, another might seize it, without injustice (11). Thus also a vine or other tree might be said to be in common, as all men were equally entitled to its produce; and yet any private individual might gain the sole property of the fruit, which he had gathered for his own repast. A doctrine well illustrated by Cicero, who compares the world to a great theatre, which is common to the public, and yet the place which any man has taken is for the time his own (d).

But when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of more permanent dominion; and to appropriate to individuals not the immediate *use* only, but the very *substance* of the thing to be used. Otherwise innumerable tumults must have arisen, and the good order of the world been continually broken and disturbed, while a variety of persons were striving who should get the first occupation of the same thing, or disputing which of them had actually gained it. As human life also grew more and more refined, abundance of conveniences were devised to render it more easy, commodious and agreeable; as, habitations for shelter and safety,

(b) Justin. l. 43, c. 1.

(c) Barbeyr. Puff. l. 4, c. 4.

(d) *Quemadmodum theatrum, cum*

commune sit, recte tamen dici potest, ejus esse eum locum quem quisque occupavit. De Fin. l. 3, c. 20.

(11.) But, our author, by and bye, tells us, "it is agreed upon all hands, that occupancy gave the original right, not only to the temporary *use*, but to

the permanent property in the *substance* of the earth itself." And see *ante*, note (2).

and raiment for warmth and decency. But no man would be at the trouble to provide either, so long as he had only an usufructuary property in them, which was to cease the instant that he quitted possession;—if, as soon as he walked out of his tent, or pulled off his garment, the next stranger who came by would have a right to inhabit the one, and to wear the other. In the case of habitations in particular, it was natural to observe, that even the brute creation, to whom every thing else was in common, maintained a kind of permanent property in their dwellings, especially for the protection of their young; that the birds of the air had nests, and the beasts of the field had caverns, the invasion of which they esteemed a very flagrant injustice, and would sacrifice their lives to preserve them. Hence a property was soon established in every man's house and homestall; which seem to have been originally mere temporary * huts or moveable cabins, suited to the design of Providence for more speedily peopling the earth, and suited to the wandering life of their owners, before any extensive property in the soil or ground was established. And there can be no doubt, but that moveables of every kind became sooner appropriated than the permanent substantial soil: partly because they were more susceptible of a long occupancy, which might be continued for months together without any sensible interruption, and at length by usage ripen into an established right; but principally because few of them could be fit for use, till improved and meliorated by the bodily labour of the occupant, which bodily labour, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein (12).

[* 5]

(12) Mr. Christian commenced his annotations upon this volume of our author's Commentaries, by denying that labour, which Blackstone thought was "universally allowed to give the fairest and most reasonable title to an exclusive property" in that upon which the labour had been bestowed, does give any such title. Mr. Christian quotes the following passage from Locke, who says, "that the labour of a man's body, and the work of his

hands, we may say, are properly his. Whatsoever then he removes out of the state nature hath provided and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property." Mr. Christian criticises this argument, and says, "it seems to be a *petitio principii*; for, mixing labour with a thing, can signify only to make an alteration in its shape or form; and if I had a right to the sub-

The article of food was a more immediate call, and therefore a more early consideration. Such as were not contented with the spontaneous product of the earth, sought for a more solid refreshment in the flesh of beasts, which they obtained by hunting. But the frequent disappointments, incident to that method of provision, induced them to gather together such animals as were of a more tame and sequacious nature; and to establish a permanent property in their flocks and herds in order to sustain themselves in a less precarious manner, partly by the milk of the dams, and partly by the flesh of the young. The support of these their cattle made the article of *water* also a very important point (13).

stance before any labour was bestowed upon it, that right still adheres to all that remains of the substance, whatever changes it may have undergone; if the right to it before belonged to another, it is clear that I have none after; and we have not advanced a single step by this demonstration." Locke would, indeed, have deserved censure for a graver fault than a paralogism, had he stated, that labour gives a title to exclusive property in any subject whatever, upon which that labour is employed; without restricting the generality of the *dictum*, by giving us to understand, that he only meant it to apply to subjects which no other person had, by previous occupancy, separated for his own private use from the common stores of nature. This title by occupancy, Mr. Christian says, "is agreeable to the reason and sentiments of mankind, prior to all civil establishments." But, occupancy alone cannot give a better title to property, than occupancy followed by the bestowal of labour upon the thing occupied; if, therefore, Locke has cautiously made it a term of his proposition, that the subject in which an exclusive property may be acquired by labour, must be one which before lay in common to all men, Mr. Christian's criticism must fall to the ground. And in the very chapter from which Mr. Christian quotes,

Locke has expressly so qualified his doctrine. He says, (in *Treat. on Gov.* book 2, c. 5, parag. 27,) "by removing a thing from the common state nature hath placed it in, this labour annexes something to it, which excludes the right of other men at least where there is enough and as good left for others." Again, he repeats, (in parag. 45,) "Labour, in the beginning, gave a right of property, wherever any one was pleased to employ it upon what was common." And afterwards, (in parag. 51,) he adds, "I think it very easy to conceive, how labour could at first begin a title of property in the common things of nature, and how the spending it upon our uses bounded that title. . . . Right and conveniency went together; for, as a man had a right to all he could employ his labour upon, so he had no temptation to labour for more than he could make use of." It is amusing, therefore, to find Mr. Christian accusing Locke of begging the question, by asserting that occupancy of what previously lay in common, and labour bestowed on the thing so occupied, gives a title to property therein; when the critic himself thinks, that mere occupancy gives such title, whenever any thing is separated for private use from the common stores of nature. See, on this subject, Heineccius, book i. c. 9. (13) See *ante*, note (2).

And therefore the book of Genesis (the most venerable monument of antiquity, considered merely with a view to history) will furnish us with frequent instances of violent contentions concerning wells; the exclusive property of which appears to have been established in the first digger or occupant, even in such places where the ground and herbage remained yet in common. Thus we find Abraham, who was but a sojourner, asserting his right to a well in the country of Abimelech, and exacting an oath for his security, "because he had digged that well (*e*).” And Isaac, about ninety years afterwards,* reclaimed this his father's property; and, after much contention with the Philistines, was suffered to enjoy it in peace (*f*). [* 6]

All this while the soil and pasture of the earth remained still in common as before, and open to every occupant: except perhaps in the neighbourhood of towns, where the necessity of a sole and exclusive property in lands (for the sake of agriculture) was earlier felt, and therefore more readily complied with. Otherwise, when the multitude of men and cattle had consumed every convenience on one spot of ground, it was deemed a natural right to seize upon and occupy such other lands as would more easily supply their necessities. This practice is still retained among the wild and uncultivated nations that have never been formed into civil states, like the Tartars and others in the east; where the climate itself, and the boundless extent of their territory, conspire to retain them still in the same savage state of vagrant liberty, which was universal in the earliest ages; and which, Tacitus informs us, continued among the Germans till the decline of the Roman Empire (*g*). We have also a striking example of the same kind in the history of Abraham and his nephew Lot (*h*). When their joint substance became so great, that pasture and other conveniences grew scarce, the natural consequence was, that a strife arose between their servants; so that it was no longer practicable to dwell together. This contention Abraham thus endeavoured to compose: "Let there be no strife, "I pray thee, between thee and me. Is not the whole "land before thee? Separate thyself, I pray thee, from me.

(*e*) Gen. xxi. 30.

(*f*) Gen. xxvi. 15, 18, &c.

(*g*) *Colunt discreti et diversi; ut*

fons, ut campus, ut nemus, placuit.

De mor. Ger. 16.

(*h*) Gen. xiii.

Land remained longest in common.

“ If thou wilt take the left hand, then I will go to the right ;
 “ or if thou depart to the right hand, then I will go to the
 “ left.” This plainly implies an acknowledged right in
 either, to occupy whatever ground he pleased, that was not
 preoccupied by other tribes (14). “ And Lot lifted up his
 “ eyes, and beheld all the plain of Jordan, that it was well
 “ watered every where, even as the garden of the Lord.
 “ Then Lot chose him all the plain of Jordan, and jour-
 “ neyed east ; and Abraham dwelt in the land of Canaan.”

[* 7]

* Upon the same principle was founded the right of mi-
 gration, or sending colonies to find out new habitations,
 when the mother country was overcharged with inhabitants,
 which was practised as well by the Phœnicians and Greeks,
 as the Germans, Scythians, and other northern people. And,
 so long as it was confined to the stocking and cultivation of
 desert uninhabited countries, it kept strictly within the lim-
 its of the law of nature. But how far the seizing on coun-
 tries already peopled, and driving out or massacring the
 innocent and defenceless natives, merely because they dif-
 fered from their invaders in language, in religion, in cus-
 toms, in government, or in colour ; how far such a conduct
 was consonant to nature, to reason, or to christianity, de-
 served well to be considered by those who have rendered
 their names immortal by thus civilizing mankind.

The necessity of
 providing sub-
 sistence intro-
 duced agricul-
 ture, which es-
 tablished a per-
 manent property
 in the soil.

As the world by degrees grew more populous, it daily
 became more difficult to find out new spots to inhabit,
 without encroaching upon former occupants ; and, by con-
 stantly occupying the same individual spot, the fruits of
 the earth were consumed, and its spontaneous produce
 destroyed, without any provision for a future supply or
 succession. It therefore became necessary to pursue some
 regular method of providing a constant subsistence ; and
 this necessity produced, or at least promoted and encou-
 raged, the art of agriculture. And the art of agriculture,
 by a regular connexion and consequence, introduced and
 established the idea of a more permanent property in the
 soil, than had hitherto been received and adopted (15). It
 was clear that the earth would not produce her fruits in

(14) Who could dispute the right, any one else ?
 if the land was neither actually nor
 potentially in the preoccupation of

(15) See *ante*, note (2.)

sufficient quantities, without the assistance of tillage: but who would be at the pains of tilling it, if another might watch an opportunity to seize upon and enjoy the product of his industry, art, and labour? Had not therefore a separate property in lands, as well as moveables, been vested in some individuals, the world must have continued a forest, and men have been mere animals of prey; which, according to some philosophers, is the genuine state of nature. Whereas now (so graciously* has Providence interwoven our duty and our happiness together), the result of this very necessity has been the ennobling of the human species, by giving it opportunities of improving its *rational* faculties, as well as of exerting its *natural*. Necessity begat property; and, in order to insure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants: states, governments, laws, punishments, and the public exercise of religious duties (16). Thus connected together, it was

[* 8]

Civil society necessary for the protection of property.

(16) "When the increase of people and stock, with the use of money, had made land scarce, (and so of some value,) the several communities settled the bounds of their distinct territories, and, by laws within themselves, regulated the properties of the private men of that society, and so, by compact and agreement, settled the property which labour and industry began." (Locke on Gov. book 2, c. 5, par. 45.) "Every man, by consenting with others to make one body politic under one government, puts himself under an obligation to every one of that society, to submit to the determination of the majority, and to be concluded by it:" (*ante*, Vol. I. pp. 45, 125, 129; and *post*, Vol. III. p. 158) "or else this original compact, whereby he with others incorporates into one society, would signify nothing, if he were no further tied by any decrees of the society, than he himself thought fit, and did *actually* consent to." (Ibid. c. 8, parag. 97.) "Whosoever therefore, out of a state of nature, unite into a community, must be understood to give up all the power necessary to the ends for which they unite into society,

to the majority of the community." (parag. 99.) "The great and chief end of men's uniting into commonwealths, and putting themselves under governments, is the preservation of their property." (cap. 9, parag. 124.) "Mankind, notwithstanding all the privileges of a state of nature, being but in an ill condition while they remain in it, are quickly driven into society. The inconveniences that they are exposed to in a state of nature, by the irregular and uncertain exercise of the power every man has of punishing the transgressions of others," (see *post*, Vol. IV. p. 8.) "make them take sanctuary under the established laws of government, and therein seek the preservation of their property: and in this we have the original rise of both the legislative and executive power." (parag. 127.) "The power which, in a state of nature, every man has of doing whatever he thinks fit for the preservation of himself and the rest of mankind, he gives up, to be regulated by laws made by the society, so far forth as the preservation of himself and the rest of that

found that a part only of society was sufficient to provide, by their manual labour, for the necessary subsistence of all: and leisure was given to others to cultivate the human mind, to invent useful arts, and to lay the foundations of science.

The right to the permanent *property* in, as well as to the temporary *use* of, the soil, became vested by occupancy.

The only question remaining is, how this property became actually vested; or what it is that gave a man an exclusive right to retain in a permanent manner that specific land, which before belonged generally to everybody, but particularly to nobody. And, as we before observed, that occupancy gave the right to the temporary *use* of the soil, so it is agreed upon all hands that occupancy gave also the original right to the permanent property in the *substance* of the earth itself (17); which excludes every one else but the owner from the use of it. There is indeed some difference among the writers on natural law, concerning the reason why occupancy should convey this right, and invest one with this absolute property: Grotius and Puffendorf insisting that this right of occupancy is founded on a tacit and implied assent of all mankind, that the first occupant should become the owner; and Barbeyrac, Titius, Mr. Locke, and others, holding, that there is no such implied assent, neither is it necessary that there should be; for that the very act of occupancy alone, being a degree of bodily labour, is, from a principle of natural justice, without any consent or compact, sufficient of itself to gain a

society shall require; which laws of society in many things confine the liberty he had by the law of nature." (parag. 129.) "For, being in a state wherein he is to enjoy so many conveniences from the labour, assistance, and society of others in the same community, as well as protection from its whole strength; he is to part, also, with as much of his natural liberty, as the good, prosperity and safety of the society shall require: which is not only necessary, but just." (Parag. 130, and see the 1st vol. of these Commentaries, pp. 125, 129, 251: Vol. IV. pp. 3, 8.) "The preservation of property being the end of government, men in society have such a right to

the goods which by the law of the community are theirs, that no body hath a right to take their substance, or any part of it from them, but by their own consent; without this they have no property at all." (Parag. 138.) "It is true, governments cannot be supported without great charge. and it is fit every one who enjoys his share of protection, should pay out of his estate his proportion for the maintenance of it. But still it must be with his own consent, *i. e.* the consent of the majority, given either by themselves, or the representatives chosen by them." (Parag. 140.)

(17) See *ante*, note (2).

title. A dispute that savours too much of nice and scholastic refinement (18)! However, both sides agree in this, that occupancy is the thing by which the title was in fact originally gained; every man seising to his own continued *use such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by any one else.

[* 9]

Property, both in lands and moveables, being thus originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law, till such time as he does some other act which shows an intention to abandon it; for then it becomes, naturally speaking, *publici juris* once more, and is liable to be again appropriated by the next occupant. So, if one is possessed of a jewel, and casts it into the sea or a public highway, this is such an express dereliction, that a property will be vested in the first fortunate finder that will seise it to his own use. But if he hides it privately in the earth or other secret place, and it is discovered, the finder acquires no property therein; for the owner hath not by this act declared any intention to abandon it, but rather the contrary: and if he loses or drops it by accident, it cannot be collected from thence, that he designed to quit the possession; and therefore in such a case, the property still remains in the loser, who may claim it again of the finder. And this, we may remember, is the doctrine of the law of England, with relation to treasure trove (i).

Property thus acquired by the first taker, remained in him till he showed an intention to abandon it, and then once more became common.

But this method of one man's abandoning his property, and another seising the vacant possession, however well founded in theory, could not long subsist in fact. It was calculated merely for the rudiments of civil society, and necessarily ceased among the complicated interests and

(i) See Vol. I. p. 295.

(18) The best use, perhaps, which can be made of the two propositions, is to show that one may be resolved by the other. The disputants, probably, all meant the same thing, in substance; and would unanimously have agreed as to the source from which the right (or rule) in question was to be finally derived. Grotius and Puffendorf, there can be little

doubt, assumed the tacit and implied assent of all mankind to be a consequence necessarily flowing from that principle of natural justice, which Barbeyrac, Titius and Locke (going back one step further), hold to be the foundation of the title acquired by occupancy. And see the 1st volume of these Commentaries, p. 138.

Mutual convenience and the interests of civil society introduced and countenanced the transfer of property by sale, grant, or conveyance.

[*10]

artificial refinements of polite and established governments. In these it was found, that what became inconvenient or useless to one man, was highly convenient and useful to another; who was ready to give in exchange for it some equivalent that was equally desirable to the former proprietor (19). Thus mutual convenience introduced commercial traffic, and the reciprocal transfer of property by sale, grant, or conveyance: which *may be considered either as a continuance of the original possession which the first occupant had; or as an abandoning of the thing by the present owner, and an immediate successive occupancy of the same by the new proprietor. The voluntary dereliction of the owner, and delivering the possession to another individual, amount to a transfer of the property; the proprietor declaring his intention no longer to occupy the thing himself, but that his own right of occupancy shall be vested in the new acquirer. Or, taken in the other light, if I agree to part with an acre of my land to Titius, the deed of conveyance is an evidence of my intending to abandon the property: and Titius, being the only or first man acquainted with such my intention, immediately steps in and seises the vacant possession: thus the consent expressed by the conveyance, gives Titius a good right against me; and possession, or occupancy, confirms that right against all the world besides (20).

(19) After the right of property was recognized, exchanges would speedily follow, as a matter of course. People would soon have a superfluity of one kind of goods, and stand in need of others. This would naturally be the case, not of individuals only, but of whole people and nations:—

Hic segetes, illic veniunt felicius uvæ,
Arborei foetus alibi, atque injussa virescunt
Gramina. Nonne vides, croceos ut Tmolus odores,
India mittit ebur, molles sua thura Sabæi?
At Chalybes nudi ferrum, virosaque Pontus
Castorea, Eliadum palmas Epirus equarum?

VIRG. 1 Georg. 54.

and this was the foundation of all trade and commerce. So long as traffic

was carried on by barter, its convenience, although even then great, must have been infinitely less than it became after a general standard was agreed upon, as the measure of all commodities. It is marvellous, that in the present day there should be some persons desirous of seeing freedom of commercial intercourse restricted, as if it were wrong in principle. Their arguments are questionable enough, when they contend for any exceptions to the rule of free trade; but some go further, and do not hesitate to deny the soundness of that which nature herself has plainly declared to be the first principle and foundation of political economy.

(20) Mr. Christian, in his note upon this passage, says, "Upon

The most universal and effectual way of abandoning property, is by the death of the occupant; when, both the And also by testamentary disposition:

whatever principle the right to property is founded, the power of giving and transferring seems to follow as a natural consequence;" and so far all his readers, probably, will be disposed to agree with him. But, what he proposes as an illustration of his doctrine, will be thought, perhaps, by some, rather to darken it. He proceeds thus: "if the hunter and the fisherman exchange the produce of their toils, no one ever disputed the validity of the contract, or the *continuance of the original title*. This (he says) does not seem to be aptly explained by occupancy, for it cannot be said that in such a case there is ever a vacancy of possession." Now, in the case put, the hunter and the fisherman respectively, by occupancy of the distinct articles which were the produce of their dissimilar toils, and which articles, before such occupancy, were in common to all mankind, had acquired separate titles to a property in those several articles; and the validity of an exchange between such proprietors, it would be unreasonable to question. But, it may be fairly questioned, whether there be not some verbal ambiguity at any rate, (and verbal ambiguities are dangerous in the discussion of title,) in saying that, after such exchange, the original title still had continuance; and whether it would not have been more proper to have said, that each of the parties to the exchange acquired thereby a new title to an exclusive property in the thing which he received in exchange; a new title founded, no doubt, as every derivative title must be, upon the original title, but still actually a new one. So, when a transfer of property takes place by any other means than by exchange, it seems at least equivocal to say, the original title has continuance. Every person, no doubt, who acquires

property which previously belonged to another, if the acquisition was made without fraud or force, has vested in him all the claims which the former proprietor has transferred; but the first and every successive transferee holds by a new title granted to himself. Evidence of the validity of the title of a former proprietor may be necessary to support the title of a new purchaser, and in that doubtful sense the old title may be said to have, for that purpose, a continuance. It is painful to offer such verbal criticisms, to which the present writer is sensible no one is likely to be more open than himself; and perhaps, though he has found difficulty in understanding Mr. Christian's note above cited, (and particularly the latter part of it,) others may find none. The following are the observations of another annotator upon this same passage of the text. "When political communities are once formed, it seems then superfluous to account for the due alienation of property, either by calling it a continuation of the former occupancy, or a dereliction of which the successor has the first notice, and takes immediate advantage. Without the help of this refinement, the effectual transfer and transmutation of property may well be referred to the force of civil institutions, ultimately founded on antecedent general principles of natural law." (Wooddeson's 19th Vin. Lect. p. 2.)

The only objection which at present occurs to this short way of putting the case, is, that, when investigating principles of justice, it is not always sufficient to state merely the immediate and the final reason upon which they rest; because, as Heineccius and his commentator Turnbull observe, (book i. c. 4, s. 108,) "some precepts of the law of nature flow immediately from clear principles of reason, others are

or, if the dying person made no such disposition, the law declared who should be his successor, representative, or heir.

[*11]

actual possession and intention of keeping possession ceasing, the property, which is founded upon such possession and intention, ought also to cease of course. For, naturally speaking, the instant a man ceases to be, he ceases to have any dominion: else, if he had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a million of ages after him, which would be highly absurd and inconvenient. All property must therefore cease upon death, considering men as absolute individuals, and unconnected with civil society: for then, by the principles before established, the next immediate occupant would acquire a right in all that the deceased possessed. But as, under civilized governments which are calculated for the peace of mankind, such a constitution would be productive of endless disturbances, the universal law of almost every nation (which is a kind of secondary law of nature) has either given the dying person a power of continuing his property, by disposing of his possessions by will; or, in case he neglects to dispose of it, or is not permitted to make any disposition *at all, the municipal law of the country then steps in, and declares who shall be the successor, representative, or heir of the deceased; that is, who alone shall have a right to enter upon this vacant possession, in order to avoid that confusion which its becoming again common would occasion (*k*). And farther, in case no testament be permitted

(*k*) It is principally to prevent any vacancy of possession, that the civil law considers father and son as one person; so that upon the death of

either, the inheritance does not so properly descend, as continue in the hands of the survivor. *Ff.* 28. 2. 11.

derived from principles of reason by many intermediate steps, and are more difficultly understood." (See *ante*, note (2), *ad finem*.) It would be unfair, however, to Mr. Wooddeson, not to add, that although he does not fully develop the connexion and harmony between municipal laws, regulating rights of property, and the laws of natural justice, he intimates, intelligibly enough, the accordance of his notions with those of Locke and Paley, who, in substance, reason thus:—As population increased, unless the rights

of property were established by positive law, disorders and violence would inevitably ensue, destructive of human happiness. But the Creator, doubtless, willed the happiness of his creatures; therefore, municipal laws, which have a tendency to that result, are founded on general principles of natural law; by which phrase is meant (where the person who utters it has any precise meaning) they are in conformity with the will of God. (See *ante*, the note to p. 13, and Vol. I. pp. 43, 54, 122.)

by the law, or none be made, and no heir can be found so qualified as the law requires, still, to prevent the robust title of occupancy from again taking place, the doctrine of escheats is adopted in almost every country; whereby the sovereign of the state, and those who claim under his authority, are the ultimate heirs, and succeed to those inheritances to which no other title can be formed (21).

The right of inheritance, or descent to the children and relations of the deceased, seems to have been allowed much earlier than the right of devising by testament. We are apt to conceive at first view, that it has nature on its side (22); yet we often mistake for nature what we find

The right of inheritance recognised earlier than the right to devise.

(21) "Where no kindred of a deceased person are to be found, there we see the possessions of a private man revert to the community, and so in politic societies come into the hands of the public magistrate; but, in the state of nature, become again perfectly common, no body having a right to inherit them, nor can any one have a property in them, otherwise than in other things common by nature." (Locke on Gov. book i. c. 9, parag. 90.)

The doctrine of *escheats* is adverted to more fully hereafter in the 5th and 15th chapters of this volume, and the notes thereto.

(22) Cicero, it will be recollected, says, "*Omni in re, consensio omnium gentium lex naturæ putandum est;*" and a philosopher of equal distinction in our own literature, thus discusses the doctrine stated in the text: "If any one had begun and made to himself a property in a particular thing, that thing, if he disposed not otherwise of it by his positive grant, descended *naturally* to his children, and they had a *right* to succeed to it, and possess it. If common consent had established this right, it would make but a positive, and not a natural right; but where the practice is universal, it is reasonable to think the cause is *natural*. The ground, then,

I think to be this: God planted in men a strong desire of propagating their kind, and continuing themselves in their posterity; and this gives children a title to share in the property of their parents, and a right to inherit their possessions. Men are not proprietors of what they have, merely for themselves; (see Vol. I. p. 447.) their children have a title to part of it, and have their kind of right (joined with their parents') in the possession, which comes to be wholly theirs, when death, having put an end to the parents' use of it, hath taken them from their possessions; and this we call inheritance: men being by a like obligation bound to preserve what they have begotten, as to preserve themselves, their issue come to have a right in the goods they are possessed of. That children have such a right is plain from the laws of God. For, children being by the course of nature born weak, and unable to provide for themselves, they have, by the appointment of God himself, who hath thus ordered the course of nature, a right to be nourished and maintained by their parents; nay, a right not only to a bare subsistence, but to the comforts and conveniences of life, as far as the conditions of their parents can afford it. Hence it comes that, when parents leave the world, and so the care due

established by long and inveterate custom. It is certainly a wise and effectual, but clearly a political, establishment ;

to their children ceases, yet its effects are to extend as far as possible, and the provisions the parents have made in their life-time, are understood to be intended, as *nature* requires they should, for their children, whom, after themselves, they are bound to provide for : though the parents, by express words, declare nothing about them, *nature* appoints the descent of their property to their children, who thus come to have a title and *natural right* of inheritance to their father's goods, which the rest of mankind cannot pretend to." (Locke on Gov. book i. c. 9, parag. 87, 88, 89.) "The right a son has to be maintained and provided with the necessities and conveniences of life out of his father's stock, gives him a *right* to succeed to his father's property for his own good." (Ibid. parag. 94.) "I think it clear, that a right to the use of the creatures was founded originally in the right a man has to subsist and enjoy the conveniences of life, and that the *natural* right children have to inherit the goods of their parents, is founded in the right they have to the same subsistence and commodities of life out of the stock of their parents, who are taught by natural law and tenderness to provide for them, as a part of themselves." (Ibid. parag. 97.)

Locke, then, appears to have viewed this question, as to a child's right of inheritance, in a totally different light from our author. Mr. Christian, though holding opinions on the subject similar to those of Locke, probably had forgotten him, at the moment when he said, (in his note on this passage of the text,) "*all* writers upon general law maintain, that children have no better claim by nature to succeed to the property of their deceased parents than strangers."

Mr. Roberts, in his Treat. on Wills,

Vol. I. p. 3, observes, "The succession to the heirs of the body, and in the case of the defect of such representatives, to the next in proximity of blood, if not a law of nature, seems so to correspond with its dictates, that history hardly carries us back to a time when the notion and admission of this claim did not prevail among mankind. The suggestions of a common feeling appear, therefore, to have made this a universal rule of transmission, and to have established it in communities widely separated by time and place. Thus, the representation in the channel of blood and proximity seems to have had its *foundation higher than any positive institutions*, though to positive institutions we must of course refer the modifications of this rule of succession." And see, to a similar purport, the 3rd of Lord Kaimes's Law Tracts, p. 109.

Paley seems to have held a middle course ; not denying that the claim of lineal descendants, to inherit their ancestor's property, may have some foundation in the law of nature ; but not appearing to think it a claim entitled to very great consideration. In the 23d chap. of the 3d book of his Mor. and Polit. Phil. he says, "Succession to intestates must be regulated by positive rules of law, there being no principle of natural justice whereby to ascertain the *proportion* of the different claimants ; not to mention that the claim itself, especially of *collateral* kindred, seems to have little foundation in the law of nature."

Observe, he does not venture to deny that the claim may have *some* natural foundation, even in the case of collaterals, and he plainly intimates that it has *more* in the case of lineal descendants. On the whole, therefore, Paley's opinion can by no means be cited as in perfect accordance with

since the permanent right of property, vested in the ancestor himself, was no *natural*, but merely a *civil*, right (23). It is true, that the transmission of one's possessions to posterity has an evident tendency to make a man a good citizen and a useful member of society: it sets the passions on the side of duty, and prompts a man to deserve well of the public, when he is sure that the reward of his services will not die with himself, but be transmitted to those with whom he is connected by the dearest and most tender affections. Yet, reasonable as this foundation of the right of inheritance may seem, it is probable that its immediate original arose not from speculations altogether so delicate and refined, and, if not from fortuitous circumstances, at least from a plainer and more simple principle. A man's children or nearest relations are usually about him on his death-bed, and are the earliest witnesses of his decease. * They became therefore generally the next immediate occupants, till at

[* 12]

the doctrines of our author, in the text above. And the justice of a child's claim to the inheritance of his father's possessions, appears to have the countenance of that authority, which, if the expression thereof be clearly understood, is definitive. In Gen. xv. 4, we are told, that after Abraham had declared one of his household to be his heir, "Behold, the word of the Lord came unto Abraham, saying, this shall not be thine heir, but he that shall come out of thy bowels shall be thine heir." It is believed, there is nothing in the Scriptures implying, that this was not previously the general rule of succession; or that the pleasure of the Almighty then declared, was restricted to that particular instance. In all such cases, it seems difficult to disconnect natural feeling (which "is the voice of God speaking in us,") from natural justice. Moses, no doubt, laid down some express laws of inheritance for the guidance of the Jews, in Numbers xxvii. 8, 9, but it would be hasty to infer, that these laws were merely of positive institution, and then first

enunciated. Philo has remarked that the Jewish lawgiver has enumerated some only of the rules of succession, leaving others to be supplied by right reason. The passage of Scripture referred to is learnedly discussed by Selden, in his *Treatise de Success. Hebræ.* cc. 12, 27.

Heineccius observes, (in book i. c. 11, s. 297,) any preference in respect of inheritance, which makes an unequal division among equals, proceeds from municipal law, pact, or private disposition: therefore, *that* is not of the law of nature. But he adds, (in sect. 303,) right reason acknowledges the right of succession in kindred; though, as these things belong rather to the permissive, than to the preceptive, part of the law of nature, much must be here left to civil legislature to fix and determine by their laws, as the end and interest of their states may require. *Post*, pp. 13, 502, and see the 1st Vol. of these Commentaries, p. 138, with Tayl. C. L. 515, 512, 527, 537.

(23) But see *ante*, note (2).

length in process of time this frequent usage ripened into general law. And therefore also, in the earliest ages, on failure of children, a man's servants born under his roof were allowed to be his heirs, being immediately on the spot when he died. For, we find the old patriarch Abraham expressly declaring, that "since God had given him no seed, his steward Eliezer, one born in his house, was his heir" (1) (24).

When property became inheritable, the heir-at-law was at first incapable of exclusion by will; but this being found inconvenient, gave rise to the right of disposing of it by testament.

While property continued only for life, testaments were useless and unknown; and, when it became inheritable, the inheritance was long indefeasible, and the children or heirs at law were incapable of exclusion by will. Till at length it was found, that so strict a rule of inheritance made heirs disobedient and headstrong, defrauded creditors of their just debts, and prevented many provident fathers from dividing or charging their estates as the exigence of their families required. This introduced pretty generally the right of disposing of one's property, or a part of it, by *testament*; that is, by written or oral instructions properly *witnessed* and authenticated, according to the *pleasure* of the deceased; which we therefore emphatically style his *will*. This was established in some countries much later than in others. With us in England, till modern times, a man could only dispose of one-third of his moveables from his wife and children; and, in general, no will was permitted of lands till the reign of Henry the eighth; and then only of a certain portion: for it was not till after the restoration that the power of devising real property became so universal as at present (25).

Until after the restoration, the power of devising real property not universal.

(1) Gen. xv. 3.

(24) Yet Abraham could not know that Eliezer would certainly be an attendant on his death-bed, and the earliest witness of his decease; the patriarch, therefore, when declaring Eliezer his heir, must have had in contemplation some other title than the doubtful one which might, or might not, accrue to Eliezer by occupancy. Eliezer was only *one* of Abraham's numerous household, to all of whom the chance of occupancy was open alike. The conclusion, then, to be drawn from the text in question,

rather seems to be, that a man's right to nominate his heir, when he had no children, was established in Abraham's time. See *ante*, note (22), and *post*, chap. 32 of this volume, pp. 489 *et seq.*, with the notes thereto, and Vol. I. p. 448; also Turnbull's learned note to Heineccius, book i. c. 11, s. 291.

(25) See *post*, p. 375. The statutes of 32 Hen. III. c. 1, and 34 Hen. VIII. c. 5, allowed all persons having an estate in fee simple, in any manors, lands, tenements, or heredi-

Wills, therefore, and testaments, rights of inheritance and successions, are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them (26); every distinct country having different ceremonies and requisites to make a testament completely valid; neither does any thing vary more than the right of inheritance under different national establishments. In *England particularly, this diversity is carried to such a length, as if it had been meant to point out the power of the laws in regulating the succession to property, and how futile every claim must be, that has not its foundation in the positive rules of the state. In personal estates the father may succeed to his children; in landed property he never can be their immediate heir, by any the remotest possibility (27): in general

Wills, &c., regulated by the civil or municipal laws.

[* 13]

To what property of his children a father may succeed.

taments, holden by socage tenure, to dispose thereof by will; and the statute of 12 Cha. II. c. 24, by converting all military tenures into socage, enabled all tenants in fee simple to devise the whole of their landed property, with the exception of their copyhold tenements. Dispositions of copyhold estates by will were not effectual without a previous surrender of such estates to the uses of the copyholder's will, until the statute of 55 Geo. III. c. 192, enacted, that thenceforth that formality should not be necessary to give validity to testamentary dispositions of such estates.

(26) But see *ante*, the notes to pp. 1 and 11, and *post*, pp. 489, *et seq.* with the notes thereto.

(27) See *post*, in chap. 14, p. 210, the author's attempt to defend this rule. Blackstone thinks the rule founded on good *legal* reason, and is of opinion, that the right of transmitting property has no foundation in the law of nature; but see *ante*, the notes pp. 1 and 11, and the note next below.

Mr. Preston, commenting upon the passage in the text, says, "by it must be understood, that the father cannot succeed to his son, merely *in the character and relation of father*. In any

other sense, it is not by any means accurate to say the father cannot, 'by any the remotest possibility,' succeed to the son as his *immediate* heir. It seems to have been Blackstone's intention to deny that there were any possible means by which the father could succeed as immediate heir to his son. A contrary doctrine, however, is clearly established. It has been held that the father may be immediate heir to his son, *as the second cousin of the son*. When a father would be entitled to be heir, as cousin to the son, if he did *not* sustain the relation of father, he is not excluded merely on the ground that he *is* the father. Suppose then, two cousins to intermarry, and that there is issue of that marriage a son, who purchases lands and dies; in inquiring for the heir to the son, it is a decisive objection to the claim of the father, that he is the father, as often as the question is, whether he shall be preferred to the uncle or great uncle of the son, on the part of the father. But, let the paternal line fail, and then recourse must be had to the maternal line. In that line the father may succeed as a cousin to his son." (Essay on Abst. ii. 449.) Surely it is high time that all this artificial jugglery should have

Right of succession by children.

only the eldest son, in some places only the youngest, in others all the sons together, have a right to succeed to the inheritance: in real estates males are preferred to females, and the eldest male will usually exclude the rest; in the division of personal estates, the females of equal degree are admitted together with the males, and no right of primogeniture is allowed.

This one consideration may help to remove the scruples of many well-meaning persons, who set up a mistaken conscience in opposition to the rules of law. If a man disinherits his son, by a will duly executed, and leaves his estate to a stranger, there are many who consider this proceeding as contrary to natural justice (28); while others so scrupulously adhere to the supposed intention of the dead, that if a will of lands be attested by only *two* wit-

an end, and that the arbitrary rules of the feudal law, the reasons for which (such as they were) have ceased, should give way to the *restoration* of a code of laws, regulating real property in a manner more simple and more accordant with natural feeling. The present writer has taken the liberty of calling the attention of the commission, now employed in the investigation of the laws of real property, to this point. Since this note was first published, it has been enacted by the statute of 3 & 4 Gul. IV. c. 106, that every lineal ancestor shall be capable of being heir to any of his issue; and be preferred to collaterals. But, as other rules growing out of the feudal law still remain for correction, the note is allowed to stand, as a hint to those who would preserve every thing that is ancient.

(28) See *ante*, the note to p. 11. The ground of the son's disinherison may materially affect the morality of the transaction; but, in ordinary cases, unless it is held that natural justice may be adverse to moral feelings, too universal not to be esteemed a part of our nature, there seems to be nothing erroneous in the opinion which

our author rejects. Paley, (in the 9th chap. of the 3rd book of his *Treat. on Mor. and Pol. Phil.*) observes, "a child's vices may be of that sort, and his vicious habits so incorrigible, as to afford much the same reason for believing that he will waste or misemploy the fortune put into his power, as if he were mad or idiotish, in which case a parent may treat him as a madman or an idiot; that is, may deem it sufficient to provide for his support, by an annuity equal to his wants and innocent enjoyments, and which he may be restrained from alienating. This seems to be the only case in which a disinherison, nearly absolute, is justifiable. Let not a father hope to excuse an inofficious disposition of his fortune by alleging, that *everyman may do what he will with his own*. All the truth which this expression contains is, that his discretion is under no control of law; and that his will, however capricious, will be valid. This by no means absolves his conscience from the obligations of a parent, or imports that he may neglect, without *injustice*, the several wants and expectations of his family." See Vol. I. pp. 447, 448.

nesses instead of *three*, which the law requires, they are apt to imagine that the heir is bound in conscience to relinquish his title to the devisee. But both of them certainly proceed upon very erroneous principles, as if, on the one hand, the son had by nature a right to succeed to his father's lands; or as if, on the other hand, the owner was by nature entitled to direct the succession of his property after his own decease. Whereas the law of nature suggests, that on the death of the possessor, the estate should again become common, and be open to the next occupant, unless otherwise ordered for the sake of civil peace by the positive law of society (29). The positive law of society, which is with us the municipal law of England, directs it to vest in such person as the last proprietor shall by will, attended with certain requisites, appoint; and, in defect of such appointment, to go to some particular person, who from the result of certain local constitutions,* appears to be the heir at law. Hence it follows, that where the appointment is regularly made, there cannot be a shadow of right (30) in any one but the person appointed: and, where the necessary requisites are omitted, the right of the heir is equally strong and built upon as solid a foundation, as the right of the devisee would have been, supposing such requisites were observed.

[* 14]

But, after all, there are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being such wherein nothing but an usufructuary property is capable of being had; and therefore they still belong to the first occupant, during the time he holds possession of them, and no longer. Such (among others) are the elements of light (31), air, and water (32); which a man may occupy by means of his windows, his gardens, his mills, and other conveniences; such also are the generality of those animals which are said to be *feræ naturæ*, or of a wild and untameable disposition: which any man may seize upon and keep for his own use or

Light, air, water, and animals *feræ naturæ*, being such wherein nothing but an usufructuary property can be had, remain common.

(29) But see *ante*, note (2); and the conclusion of the note to p. 10.

natural right, see *ante*, the notes to pp. 11, 12, 13.

(30) If the author takes his stand upon the *legal* right, his position is impregnable; as to the question of

(31) See *post*, p. 395, n.

(32) See *post*, p. 18, n.

pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards.

Forests, waste
lands, &c.

[* 15]

Again: there are other things in which a permanent property *may* subsist, not only as to the temporary use, but also the solid substance; and which yet would be frequently found without a proprietor, had not the wisdom of the law provided a remedy to obviate this inconvenience. Such are forests and other waste grounds, which were omitted to be appropriated in the general distribution of lands; such also are wrecks, estrays, and that species of wild animals which the arbitrary constitutions of positive law have distinguished from the rest by the well-known appellation of game. With regard to these and some others, as disturbances and quarrels would frequently arise among individuals, contending about the *acquisition of this species of property by first occupancy, the law has therefore wisely cut up the root of dissension (33), by vesting the things themselves in the sovereign of the state: or else in his representatives appointed and authorized by him, being usually the lords of manors (34). And thus the legislature of England has universally promoted the grand ends of civil society, the peace and security of individuals, by steadily pursuing that wise and orderly maxim, of assigning to every thing capable of ownership a legal and determinate owner.

(33) At the present day, it affords matter for melancholy reflection, to think how much Blackstone was mistaken, when he held, that, by giving the property in game to the lords of manors, the wisdom of the law had "cut up the root of dissension" as to this matter. The amount of crime (and consequently of misery) arising out of this state of things, it would, however, be invidious to expatiate upon, now that a reform of the system,

grounded upon full details of its incidental enormities, is under the consideration of the legislature.

Since this note was first published, the property in game is, by the statute of 1 & 2 Gul. IV. c. 32, vested in the occupiers of the land on which it is found; unless the property in such game has been reserved by, or to, the landlord, lessor, or some other person.

(34) See *post*, pp. 39, 403, 411.

CHAPTER II.

OF REAL PROPERTY; AND, FIRST, OF CORPORAL HEREDITAMENTS.

THE objects of dominion or property are *things*, as distinguished from *persons*: and things are by the law of England distributed into two kinds; things *real* and things *personal*. Things real are such as are permanent (1), fixed, and immoveable, which cannot be carried out of their place; as lands and *tenements*: things personal are goods, money, and all other moveables; which may attend the owner's person wherever he thinks proper to go (2).

The objects of property.

Real.

Personal.

(1) Mr. Preston, referring to the passage in the text, says, "In the language of Mr. Justice Blackstone, nothing is a tenement which is not of a *permanent* nature. The term, whether applied to the *subject* or the interest therein, is equally vague; perhaps it is not too much to add, erroneous. A rent-charge is not, in any respect, necessarily more permanent than an annuity; yet one is a tenement, and the other is not. (See *post*, p. 113, n.) These contrasted examples prove, that the epithet may be omitted, and that the definition which excludes it will, if not more certain and precise, be at least open to less objection." (Essay on Est., part 1, p. 10.) See *post*, p. 40, n. and Vol. III. c. 10, p. 167.

(2) When he comes to the 24th chapter of this volume, (p. 385,) the reader will be taught, by Blackstone

himself, that the definition of things personal, which is given in the text above, is inaccurate. He will learn, that "things personal, by our law, do not only include things *moveable*, but also something more: the whole of which is comprehended under the general name of *chattels*. The idea of goods, or moveables only, is not sufficiently comprehensive to take in every thing that the law considers a chattel interest. For, there are two requisites to make a fief or heritage: duration as to time, and immobility with regard to place; whatever wants either of these qualities is not, according to the Normans, an heritage or fief, or, according to us, is not a *real* estate: the consequence of which in both laws is, that it must be a *personal* estate." Our author then proceeds to distribute chattels into two kinds; chattels *real*, and chattels *personal*.

In treating of things real, let us consider, first, their several sorts or kinds ; secondly, the tenures by which they may be holden ; thirdly, the estates which may be had in them ; and, fourthly, the title to them, and the manner of acquiring and losing it.

Things real are

Lands,

Tenements,

[* 17]

First, with regard to their several sorts or kinds, things real are usually said to consist in lands, tenements, or hereditaments. *Land* comprehends all things of a permanent, substantial nature; being a word of a very extensive signification (3), as will presently appear more at large. *Tenement* is a word of still greater extent, and though in its vulgar acceptation it is only applied to houses *and other buildings, yet in its original, proper, and legal sense, it signifies every thing that may be *holden*, provided it be of a permanent (4) nature ; whether it be of a substantial and sensible, or of an unsubstantial ideal kind. Thus *liberum tenementum*, frank tenement, or freehold, is applicable not only to lands and other solid objects, but also to offices, rents, commons, and the like (a) : and, as lands and houses are tenements, so is an advowson a tenement (5); and a fran-

(a) Co. Litt. 6.

The latter, only, it will be seen, come strictly within the definition given above ; the former, as comprising interests which, though less than freehold, are issuing out of *land*, acquire their character of personalty, not from their mobility, but from their determinate duration. This subject is also touched upon, *post*, in chapter 9, p. 143.

(3) Whatever may be the subject of a feoffment, and lies in livery, is a corporeal hereditament, in other words, land. (Prest. on Est. 1, p. 8, citing Shep. Touch. 202, 209.)

(4) See note (1) to last page.

(5) In the case of *Hopewell v. Ackland*, as reported in 1 Salk. 238, Trevor, C. J., is represented to have said, that "advowsons in gross are not comprised in the words lands and *tenements*." This *dictum*, however, does not appear in the report of the same case, in Comyn, 168, though it cer-

tainly was cited, without any expression of disapprobation, in *Pocock v. The Bishop of Lincoln*, 3 Bro. & B. 47 ; 6 Moo. 177 ; and in *Kensey v. Langham*, Ca. t. Talb. 144, Lord Chancellor Talbot said, "he was *not clear* that the word tenement did extend to such incorporeal hereditaments as advowsons : " but his Lordship by no means gave a decisive opinion on the subject ; on the contrary, he said, "he did not think it necessary to enter into it at that time." The true ground, however, on which the judgment in *Kensey v. Langham* proceeded, was, that the advowson did not pass, under the words of the will in that case, only because what was given to the trustees was given to *raise money*, and none could be raised from a *void* church. This is so stated in the recent case of *Gully v. The Bishop of Exeter*, 4 Bing. 297, in which all the previous leading authorities are

chise, an office, a right of common, a peerage, or other property of the like unsubstantial kind, are, all of them, legally speaking, tenements (*b*). But an *hereditament*, says Sir Edward Coke (*c*), is by much the largest and most comprehensive expression; for it includes not only lands and tenements, but whatsoever may be *inherited*, be it corporeal, or incorporeal, real, personal, or mixed. Thus, an heir-loom, or implement of furniture, which by custom descends to the heir together with an house, is neither land, nor tenement, but a mere moveable; yet, being inheritable, is comprised under the general word hereditament: and so a condition, the benefit of which may descend to a man from his ancestor, is also an hereditament (*d*).

and Hereditaments, which not only include the two former, but also whatsoever may be inherited, whether corporeal, or incorporeal, real, personal, or mixed.

Hereditaments then, to use the largest expression, are of two kinds, corporeal and incorporeal (6). Corporeal con-

Hereditaments are of two kinds, corporeal and incorporeal.

(*b*) Co. Litt. 19, 20.

(*c*) 1 Inst. 6.

(*d*) 3 Rep. 2.

considered; and, by the result, it seems to be satisfactorily established, that an advowson *in gross* will pass in a will under the word tenement: it follows, *à fortiori*, that an advowson *appendant* to a manor lies strictly in *tenure*. The extra-judicial *dictum* in *Hopewell v. Ackland*, and the equally unnecessary declaration of uncertainty upon the subject expressed in *Kensey v. Langham*, cannot have any weight when opposed to the numberless cases (many of which are adverted to in *Rennell v. The Bishop of Lincoln*, 3 Bing. 233; 11 Moo. 139; 7 Barn. & Cress. 147; 9 Dowl. & R. 813;) in which parties are judicially declared to be *seised* as in fee, or in tail, of an advowson: for “*seisin* is a technical term, to denote the completion of that investiture, by which the tenant was admitted into the *tenure*.” (Per Lord Mansfield, in *Taylor on dem. Atkyns v. Horde*, 1 Bur. 107).

Till the church becomes void, it is impossible, certainly, to acquire any thing more than a *seisin in law* of an advowson; but presentation to the church, when it is void, is allowed to be equivalent to a *corporeal* *seisin* of the land. (1 Inst. 29 a.) An advowson,

then, is a tenement, of which *seisin* may be had, but which does not lie in livery, and of which, therefore, *per se*, a feoffment cannot be made (1 Inst. 49 a); but which properly lies in grant. (1 Inst. 172 a.) However, when an advowson is *appendant* to a manor, any feoffment which will pass the principal subject may, together with it, pass the accessory. (*Martel's case*, Jenk. Cent. 265, pl. 68, and Touch. 92).

(6) Mr. Fearne, in his learned “Reading on the Statute of Inrolments,” (27 Hen. VIII. c. 16.) observes, “the word *hereditaments*, in our law, though applicable both to real and to personal property, applies to the two species of things in a different mode or degree of relation. When applied to things *real*, it generally denotes the things themselves which are the subjects of property, without regard to the nature or extent of property therein; but when used in relation to *personal* things, the word *hereditaments* does not import or signify the things themselves, but is only applicable to them in respect of some inheritable right, of which they are in some mode or other the subject. Of

sist of such as affect the senses ; such as may be seen and handled by the body : incorporeal are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation.

Corporeal hereditaments consist wholly of substantial and permanent objects.

Corporeal hereditaments consist wholly of substantial and permanent objects ; all which may be comprehended under the general denomination of land only. For *land*, says Sir Edward Coke (*e*), comprehendeth in its legal signification any ground, soil, or earth whatsoever (7); as arable,

(*e*) 1 Inst. 4.

a nature in some measure intermediate between the two already noticed, there is a third application of the word *hereditaments*, wherein it is used to denote inheritable rights respecting lands, or something issuing therefrom, or exercisable therein, or having at least some local connexion or relation separate and distinct from the enjoyment of the lands themselves. Hence we obtain the division of hereditaments into *real*, *personal*, and *mixed*. Besides this distribution, there is another general division of hereditaments into *corporeal* and *incorporeal*. The first description is confined to those subjects of property which are comprised under the denomination of *things real*. Incorporeal hereditaments are such as derive the denomination of hereditaments, not from the *things* themselves, but from the inheritable *rights* of which they are the subject : for rights are of an incorporeal nature. Incorporeal hereditaments therefore comprise the two divisions of *mixed* and *personal* hereditaments already noticed, and under the same description I would include such *real* hereditaments as consist of rights to the future enjoyment of lands, divided from the present possession ; for though corporeal hereditaments are their subject, yet, whilst the rights remain distinct from the right of actual possession, I see nothing sub-

stantial in their nature ; on the contrary, they seem clearly to fall within that predicament which I take to be the criterion of an *incorporeal* inheritance, *tangi non potest, nec videri*. There are also other properties common to them with other estates, which are universally arranged in the class of incorporeal inheritances ; for instance, they do not lie in livery, and cannot be transferred without deed, except in some special instances, similar to some of those in which *corporeal* inheritances may be passed at common law, without livery of seisin."

It is proper to add, that one of the opinions held by Mr. Fearne in the work from which the above quotations are taken, and where he laid it down that attornment was necessary to perfect a grant of a reversion, in hereditaments, has been clearly refuted (in 2 Prest. on Abst. 85, in 2 Saund. on Uses, 38, and in Sugden's note to Gilb. on Uses, 226) ; the objection, however, does not at all apply to any of the passages here cited.

Mr. Fearne's criterion of an incorporeal hereditament, he adopted from Lord Coke's 1st Instit. 9 a. And see our author's account of the same subject, in the chapter next following, p. 20.

(7) Mr. Cruise, (in his Dig. 4, tit. 32, ch. 20, p. 321,) says, "the word *land*, strictly taken, only signifies *arable* land. For in every antient *præcipe*

meadows, pastures, woods, moors, waters, marshes, furzes, and heath. It legally includeth also all castles, *houses, and other buildings; for they consist, saith he, of two things; *land*, which is the foundation, and *structure* thereupon: so that, if I convey the land or ground, the structure or building passeth therewith. It is observable that *water* is here mentioned as a species of land, which may seem a kind of solecism; but such is the language of the law: and therefore I cannot bring an action to recover possession of a pool or other piece of water by the name of *water* only; either by calculating its capacity, as, for so many cubical yards; or, by superficial measure, for twenty acres of water; or by general description, as for a pond, a watercourse, or a rivulet: but I must bring my action for the land that lies at the bottom, and must call it twenty acres of *land covered with water* (*f*). For water is a moveable wandering thing, and must of necessity continue common (8) by the law of nature; so that I can only have a temporary, transient, usufructuary, property therein: wherefore, if a body of water runs out of my pond into another man's, I have no right to reclaim it. But the land, which that water covers, is permanent, fixed, and immoveable: and therefore in this I may have a certain substantial property; of which the law will take notice, and not of the other.

[* 18]
What is com-
prehended in
the term
"land."

(*f*) Brownl. 142.

we constantly find the words *terra, pratum, et pastura*—land, meadow, and pasture. (And see *Silly v. Silly*, 1 Vent. 260.) But this confined meaning of the word land was only adopted when used in a *præcipe* in an adversary suit."

(8) See *ante*, p. 14, and *post*, p. 395. In *Mason v. Wilson*, 5 Barn. & Adol. 24, and 2 Nev & Man. 764. C. J. Denman said, "the Roman law considered running water, not as a *bonum vacans*, but as public or common, in this sense only, that all might drink it, or apply it to the necessary purposes of supporting life; and that no one had any property in the water itself, except in that parti-

cular portion which he might have abstracted from the streams, and of which he had the possession. We, (the Court of K. B.) think no other interpretation ought to be put upon the passages in Blackstone. It appears to us there is no authority in our law that the first occupant (though he may be the proprietor of the land above) has any right, by diverting the stream, to deprive the owner of the land below of the advantage of the natural flow of water thereto; unless he has gained the right to divert the stream by grant, or by the legally prescribed length of enjoyment." And see to the same effect, *Wright v. Howard*, 1 Sim. & Stu. 203.

Extent of its
legal signifi-
cation.

Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad cælum*, is the maxim of the law, upwards; therefore no man may erect any building, or the like, to overhang another's land: and downwards, whatever is in a direct line, between the surface of any land and the centre of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries (9). So that

(9) The passage in the text requires a little qualification. The result of experience in the mining countries is not uniform. In *Curtis v. Daniel*, 10 East, 274, Bayley, J., held, that "although the presumption of law, generally speaking, is that all mines under freehold belong to the freeholder, in Cornwall it might be otherwise as to tin mines, which are governed by peculiar laws and customs." On a motion for a new trial, Lord Ellenborough, C. J., asked, "Why may there not be two customs, one for the lord of the manor to have the tin, and another for the tenants to have the copper under their estates?" And it is perfectly well established, that, all mines of gold and silver within the realm, though in the lands of subjects, belong to the Crown by prerogative, with liberty to dig and carry away the ores thereof, and with all other such incidents thereto as are necessary to be used for getting the ore. (The *Queen* and The *Earl of Northumberland*, in the case of Mines, Plowd. 336.) However, as in this country no mines have been discovered which, properly speaking, can be described as gold and silver mines, this prerogative is not very valuable. A slight intermixture of gold or silver will not constitute a royal mine, where the bulk of the ore is of baser metal. A majority of the judges did, indeed, in the case cited, hold a different opinion; but as this rule would have operated as a great discouragement to any subject to open any mine whatsoever, it

was enacted by 1 Gul. & Mary, sess. 1. c. 30, s. 4, that no mine of copper, tin, iron, or lead, should be adjudged to be a royal mine, although gold or silver might be extracted out of the same. The act was explained, and a right of preemption secured to the Crown, by 5 & 6 Gul. & Mary, c. 6. The rate of purchase at which that right might be exercised, was altered by 55 Geo. III, c. 134. (See Vol. I. p. 294.) From the same case in Plowden it may also be collected, that, if in a grant of an estate by the Crown there be a bare reservation of royal mines, without any proviso for right of entry, (which would be essential in the case of a private individual,) it is competent to the Crown to grant a license to any person to come upon the estate so granted, and dig up the soil in search of such mines. Lord Hardwicke, it is true, (in *Lyddal v. Weston*, 2 Atk. 20,) held a contrary doctrine; but Lord Eldon (in *Seaman v. Vawdrey*, 16 Ves. 393), repudiated Lord Hardwicke's attempt to unsettle what had been resolved by the twelve Judges, in the case in Plowden.

The freehold of customary lands, and lands held by copy of court roll, is in the lord of the manor. In such lands, unless the act be authorized by special custom, (*Whitchurch v. Holworthy*, 19 Ves. 214; *S. C.* 4 Mau. & Sel. 340,) it is neither lawful for the customary tenant, or copyholder, to dig and open new mines, without the license of the lord of the manor; nor for the lord, without the consent of

the word "land" includes not only the face of the earth, but every thing under it, or over it. And therefore if a

the tenant, to open new mines under the lands occupied by such tenant. (*Bishop of Winchester v. Knight*, 1 P. Wms. 408. And see, as to the latter point, the opinion of two Judges against one, in the *Lord of Rutland v. Greene*, 1 Keble, 557, and *infra*.) The acts which a lord of a manor may do by custom, to enable him profitably to work mines, previously opened, under lands which are parcel of his manor, must not be unreasonably oppressive upon the occupier of the lands, or the custom cannot be maintained. (*Wilkes v. Broadbent*, 1 Wils. 64.) And the lord of a manor cannot open new mines upon copyhold lands within the manor, without a special custom or reservation; for the effect might be a disinherison of the whole estate of the copyholder. The lord of a manor may be in the same situation with respect to mines as with respect to trees: that is, the property may be in him, but it does not follow that he can enter and take it. The lord must exercise a privilege over the copyholder's estate, if during the continuance of the copyhold he works mines under it; and a custom or reservation should be shown to authorize such a privilege: but as soon as the copyhold is at an end, the surface will be the lord's as well as the minerals, and he will have to work upon nothing but his own property. (*Grey v. The Duke of Northumberland*, 13 Ves. 237; 17 Ves. 282; and S. P., at law, under the title of *Bourne v. Taylor*, 10 East, 205, where all the leading cases on the subject are discussed.) The right to mines may be distinct from the right to the soil. In cases of copyholds, a lord may have a right under the soil of the copyholder; but where the soil is in the lord, all is resolvable into the ownership of the soil, and a grant of the soil

will pass every thing under it. (*Townley v. Gibson*, 2 T. R. 705.)

It seems, then, that royal mines, if any such exist in this country, do *not* belong to the owner of the surface: that with respect to other minerals, even under freehold land, "every day's experience in the mining countries" is not uniform: and that as to mines under customary or copyhold lands, neither the lord of the manor, who has the freehold, nor the tenant who has the enjoyment of the surface, can open fresh mines, without a special custom or express compact. The lord of the manor has, indeed, in a certain sense, the property in such mines; but if the estate of the customary or copyhold tenant of the surface be an estate of inheritance, the lord may never be able to make his qualified property in the mines available, except by purchasing the right to work them. This may, perhaps, serve to explain the *dictum* in *Lord Cullen's* case, (2 Str. 1142,) that "mines are a distinct possession, and may be different inheritances."

If the owner of a fee grants, by indenture, liberty to dig for minerals throughout certain lands therein described, and to raise and dispose of the same for the grantees own use, and to make adits necessary for the exercise of that liberty, *habendum* for twenty-one years: this deed operates as a license only, and not as a demise of the metals and minerals, so as to vest in the lessee a legal estate therein during the term. By such a deed, the grantor does not part with all the ores then existing within the land, but such parts thereof only as should, under the power given to search and get, be found within the described limits, which is nothing more than a license to search or get, with a grant of such of the ore only as should be found and got, the grantor parting with no estate or in-

[* 19]

man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. Not but the particular names of the things are equally sufficient to pass them, except in the instance of* water; by a grant of which, nothing passes but a right of fishing (*g*) (9): but the capital distinction is this, that by the name of a castle (10), messuage (11),

(*g*) Co. Litt. 4.

terest in the rest. The grantee, therefore, has no estate or property in the land itself, or in any part of the minerals ungot therein: he has a right of property only as to such part thereof, as upon the liberties granted to him should be dug and got. This is no more than a right to a mere personal chattel, being *very different from a grant or demise of the mines*, or minerals, in the land. (*Doe v. Wood*, 2 Barn. & Ald. 736.) In the case just cited, it was held, that, under the circumstances stated in that case, the grantee could not maintain an action of ejectment.

(9) The different rights of free fishery, several fishery, and common of piscary, are enlarged upon, *post*, in the 7th section of the next chapter, pp. 39, 40, and the notes thereto. It will there be seen, that, however indisputable it may be, that, by a grant of waters, nothing passes but a right of fishing therein; it is not equally well settled, whether, by grant of a several piscary, the soil does, or does not pass. Lord Coke observes, (1 Inst. 5 b,) "by grant of a vivarye, not only the privilege, but the land itself passes." And, in his note on the 11th chapter of the statute of Merton, (2 Inst. 100,) he says, "*Vivarium* is a word of large extent. Most commonly in law it signifieth parks, warrens, and pischaries or fishings; here it is taken for warrens and fishings." Probably, the term *vivarye* is most correctly applied to places in which animals that have been deprived of the full liberty

of their natural state are preserved; and, where fishes are the subjects, a vivarye may only mean an inclosed fish-pond, or stew, not an open stream.

(10) By the name of a castle, one or more manors may be conveyed; and *e converso*, by the name of a manor, a castle may pass. 1 Inst. 5; 2 Inst. 31. —CH. ["Land may be parcel of a castle; castle, honour, and the like, are things compound, and may comprise messuages, lands, meadows, woods, and such like."] (*Hill v. Grange*, 1 Plowd. 168, 170.)—ED.]

(11) A *messuage*, in intendment of law, *primâ facie* comprehends land, and it will be presumed that a *curtilage*, at least, belongs thereto. (*Scholes v. Hargreaves*, 5 T. R. 48; *Hockley v. Lamb*, 1 L. Raym. 726; *Scamler v. Johnson*, T. Jones, 227; *Patrick v. Lowre*, 2 Brownl. 101; it should be observed, however, that *North v. Coe*, Vaugh. 253, is *contra*.) As to the definition of the word "curtilage," see Mr. Ryland's note to Vol. IV. p. 226. Rights of common, and even of *several* pasturage, may be appurtenant to a messuage; (*Potter v. Sir Henry North*, 1 Ventr. 390;) or to a cottage; (*Emerton v. Selby*, 1 L. Raym. 1015;) and where common is appurtenant, *in right*, to a tenement, it goes with the inheritance. (1 Bulst. 18.) So a garden may be said to be parcel of a house, and by that name will pass in a conveyance. (*Smith v. Martin*, 2 Saund. 401 a; S. C. 3 Keb. 44.) It has also been held, that land may pass as per-

toft (12), croft (13), or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of (14); but by the name of land, which is *nomen* ^{What passes by it.} *generalissimum*, every thing terrestrial will pass (*h*).

(*h*) Co. Litt. 4, 5, 6.

taining to a house, if it hath been occupied therewith for ten or twelve years, for by that time it has gained the name of parcel or belonging, and shall pass with the house in a will or lease. (*Higham v. Baker*, Cro. Eliz. 16; *Wilson v. Armourer*, T. Raym. 207; *Loftes v. Barker*, Palm. 376.) And by the demise of a messuage, a garden and the curtilage will pass, without saying *cum pertinentiis*. (*Carden v. Tuck*, Cro. Eliz. 89.) For this purpose the word *messuage* seems formerly to have been thought more efficacious than the word house. (*Thomas v. Lane*, 2 Cha. Ca. 27; S. P. Keilway, 57.) But the subtilty of such a distinction has been since disapproved. (*Doe v. Collins*, 2 T. R. 502.) And when a man departs with a messuage *cum pertinentiis*, even by feoffment, or other common law conveyance, not only the buildings, but the *curtilage* and garden (if any there be) will pass. (*Bettisworth's case*, 2 Rep. 32; *Hill v. Grange*, 1 Plowd. 170 a; *S. C. Dyer*, 130 b.) *A fortiori*, in a will, although *lands* will not pass under the word *appurtenances*, taken in its strict technical sense; they will pass if it appear that a larger sense was intended to be given to it. (*Buck v. Nurton*, 1 Bos. & Pull. 57; *Ongley v. Chambers*, 1 Bing. 498; 9 Moo. 687; *Press v. Parker*, 2 Bing. 462; 10 Moo. 169.)

(12) "When land is built upon, the space occupied by the building changes its name into that of a messuage. If the building afterwards falls to decay, yet it shall not have the name of land, although there be nothing in substance left but the land, but it shall be called a *toft*, which is a name superior to land and inferior to messuage." (*Hill*

v. Grange, 1 Plowd. 170.)

(13) *Croft*, is a small inclosure near to the homestead.

(14) So long as fines and recoveries were looked upon strictly as adversary suits, it was held that a reputed manor, which was not a manor in truth, would not pass by the name of a manor in a fine or common recovery, though it might in a conveyance, where the intent of the parties would help the inaccuracy of description. (*Mallet v. Mallet*, Cro. Eliz. 524.) But when fines and common recoveries came to be looked upon as common assurances only, they were deemed to pass, under the word *manor*, not only a reputed manor, but also, where it is a manor indeed, lands not in fact parcel of the manor, but which are so reputed. (*Thynne v. Thynne*, 1 Lev. 28; *Sir Moyle Finch's case*, 6 Rep. 67.) Lord Mansfield (in *Massey v. Rice*, Cowp. 349,) was so fully impressed with a sense of the mischief likely to result from allowing a common recovery to be reversed, upon slight objections to the accuracy of description in the *præcipe*, that he strongly said, "the consequences of these objections are great; they are void of the least glimmering of common sense; and it would be attended with vast inconveniences to the public in many cases, without a possibility of doing good in any, if in common recoveries, which are a species of conveyance and common assurance, such nice exceptions were to prevail." Since this note was first published, fines and recoveries have been abolished, and more simple modes of assurance substituted, by the statute of 3 & 4 Gul. IV. c. 74.

CHAPTER III.

OF INCORPOREAL HEREDITAMENTS.

Definition of
incorporeal he-
reditaments.

An incorporeal hereditament (1) is a right issuing out of a thing corporate (whether real or personal), or concerning,

(1) See *ante*, in the note to p. 17, Mr. Fearne's definition of *incorporeal hereditaments*, which is analogous to that given by our author; the closeness of resemblance was to be expected, as both copied from the same original, sketched by Lord Coke.

It is to incorporeal hereditaments alone that prescription, using that word in its strict sense as referring to immemorial usage, properly applies; (see this subject enlarged upon, *post*, in chap. 17, pp. 263, *et seq.* and the notes thereto;) but there is another kind of prescription, established by the statute law, which extends equally to corporeal hereditaments, and by virtue of which an uninterrupted possession for a certain number of years will give the possessor a good title, by taking away from all other persons the right of entering on such hereditaments, or of maintaining any action at law, or suit in equity, for them. (See this subject exhausted, in the arguments and judgment in the great case of *Cholmondely v. Clinton*, 2 Jac. & Walk. 1—206.)

Incorporeal hereditaments may be conveyed either by grant, or by bargain and sale; by covenant to stand seised, or by lease and release, for they

are within the Statute of Uses, (27 Hen. VIII. c. 10,) in construing which, the word hereditaments is to be understood generally, not confining its operation to such as are corporeal. To make such conveyances valid, however, by aid of the statute, the incorporeal hereditaments must be in actual existence at the time, otherwise no use can arise; (*Beaudeley v. Brook*, Cro. Jac. 189;) and where the conveyance is by grant, the grant only operates on the estate and interest of the grantor, and will pass no more than he is by law enabled to convey. Consequently, if a tenant in tail of a rent service, or a reversion or remainder in tail, grants the same in fee, and dies, this is no discontinuance (see Vol. III. pp. 171, 172.) to the issue in tail. On the same principle, a grant cannot occasion a forfeiture; thus, if a tenant for life or years of an advowson, rent, common, reversion or remainder of land, or other incorporeal hereditament, grants the same in fee, this is no forfeiture; because nothing passes but that which lawfully may pass. (1 Inst. 251 b. 327 b.)

A particular estate, however, in any incorporeal hereditament, may be for-

or annexed to, or exercisable within, the same (a). It is not the thing corporate itself, which may consist in lands, houses, jewels, or the like ; but something collateral thereto, as a rent issuing out of those lands or houses, or an office relating to those jewels. In short, as the logicians speak, corporeal hereditaments are the substance, which may be always seen, always handled : incorporeal hereditaments are

(a) Co. Litt. 19, 20.

feited by matter of record, amounting to a clear renunciation of the feudal connexion between the tenant and his lord. Thus, before fines were abolished, if a tenant for life, of any hereditament, corporeal or incorporeal, levied a fine *sur cognizance de droit come ceo*, &c., this operated a forfeiture of his estate ; if he accepted a fine of the same kind from a stranger, this equally caused a forfeiture ; for, by admitting the reversion to be in a stranger to convey, and by accepting it himself to the prejudice of the person in reversion, he unequivocally denied the tenure. (*Margaret Poger's* case, 9 Rep. 106 b.) And though the reversion was not divested by a fine *come ceo*, levied by a tenant for life of an advowson *in gross*, still the act worked a forfeiture of the estate for life. (*Springe v. Sir Julius Cæsar*, 1 Rolle's Abr. 852.) But, a fine *sur concessit* had not the same effect ; for a fine of this description only transferred such an interest as the tenant for life might lawfully pass. (*Pigott v. Earl of Salisbury*, T. Jones, 69 ; *Lethieullier v. Tracy*, 3 Atk. 729, 730.) And even a fine *come ceo*, &c., levied by a *cestui que trust* for life, did not cause a forfeiture ; (*Whetstone v. Bury*, 2 P. Wms. 147 ;) for whatever conveyance a tenant for life of a *trust* makes, he cannot destroy the contingent remainders vested in the trustees, he having no legal estate in him ; and his conveyance, whatever be its nature, will only pass what

he can legally *grant*. A tenant in tail of a trust might, it is true, bar the remainders by a common recovery, as he may now by a simpler assurance, but that is because he is really master of the estate, and may call in the legal estate when he pleases, and have it executed to the trust ; but a Court of Equity will never execute the estate in law to a *cestui que trust* for life, to enable him to destroy the contingent remainders. (*Penhay v. Hurrell*, 2 Freem. 213 ; *Lethieullier v. Tracy*, *ubi supra*.)

If the tenant for life of incorporeal hereditaments suffered a common recovery, wherein he was vouched, without the concurrence of the person in remainder, this operated a forfeiture of the estate for life, in the same manner as a fine *come ceo* levied of the hereditaments would have done. Of course the same rule applied to corporeal hereditaments. (*Pelham's* case, 1 Rep. 15.)

So, if the tenant of a particular estate in hereditaments, is a party to any act in a court of record, whether as plaintiff or defendant, which act, either expressly or virtually, amounts to a denial of his tenure, he will incur a forfeiture. (Co. Litt. 251 b, 252 a ; 1 Roll. Abr. 851—858.) Though the statute of 3 & 4 Gul. IV. c. 74, abolished fines and recoveries, the titles to very many estates depend on the validity of such assurances previously put on record. The learning on the subject therefore, is not yet obsolete.

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but a sort of accidents, which inhere in and are supported by that substance; and may belong, or not belong to it, without any visible alteration therein. Their existence is merely in idea and abstracted contemplation: though their effects and profits may be frequently objects of our bodily senses. And, indeed, if we would fix a clear notion of an incorporeal hereditament, we must be careful not to confound together the profits produced, and the thing, or hereditament, which produces them. An annuity, for instance, is an incorporeal hereditament (2): for though the money, which is the fruit or product of this annuity, is doubtless of a corporeal nature, yet the annuity itself, which produces that money, is a thing invisible, has only a mental existence, and cannot be delivered over from hand to hand. So tithes, if we consider the pro*duce of them, as the tenth sheaf or tenth lamb, seem to be completely corporeal; yet they are indeed incorporeal hereditaments: for they being merely a contingent springing right, collateral to or issuing out of lands, can never be the object of sense; that casual share of the annual increase is not, till severed, capable of being shown to the eye, nor of being delivered into bodily possession.

They are principally of ten sorts;

Incorporeal hereditaments are principally of ten sorts: advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities, and rents.

I. Advowsons.

I. Advowson (3) is the right of presentation to a church,

(2) Of course, our author meant to speak of an annuity granted to a man and his heirs; not of an annuity for the life of the grantee, which in no sense of the word can be called an *hereditament*. The word is, no doubt, often inserted in grants for life or years, but then it is only with reference to some subject which is matter of inheritance. (*Smith v. Tindal*, 11 Mod. 90.)

(3) Our author's account of the origin and nature of advowsons is (so far as he here goes into the subject) in conformity with that given in Gibson's Codex, 757, and in 1 Instit. 17 b, 18; but Lord Coke adds, there may be two several patrons, (and two several in-

cumbents,) of one church; and one part of the church, as well as of the parish allotted to one, and the other part to the other: in which case each right of advowson is termed *advocatio medietatis ecclesiæ*; which he distinguishes from *medietas advocacionis ecclesiæ*, both as to the nature of the right, and the proper remedy for a disturbance thereof. (*Quære*, might this suggest a useful hint towards settling the *vexata quæstio* as to the church of Ireland?) By the statute of 3 & 4 Gul. IV. c. 27, no advowson can be recovered after an adverse enjoyment by three different incumbents, for a period amounting, altogether to sixty years; or after a period

or ecclesiastical benefice. Advowson, *advocatio*, signifies *in clientelam recipere*, the taking into protection; and there-

of 100 years of adverse enjoyment, although there may not have been three several incumbencies within that time.

The right of advowson regularly includes, not only the right of presentation, but the right of nomination to a church. These two rights, however, may exist in different persons. A person seised of an advowson may make a valid grant, binding himself to present the nominee of the grantee, when the church shall next become vacant; and for that turn, the grantee will, for most purposes, be considered as patron of the church. (*Throckmorton v. Tracy*, 1 Plowd. 157; *Hare v. Bickley*, 2 Plowd. 529; *Calvert v. Kitchen*, Lane, 36.) Where the legal estate in an advowson is vested in trustees, they have the right of presentation in them; but the right of nomination is in the *cestui que trust*; (*Boteler v. Allington*, 3 Atk. 458; *Mutter v. Chauvel*, 1 Meriv. 493;) but it appears from the cases just cited, if the trustee of an advowson does present, and the *cestui que trust* (not being entitled to some legal exemption taking him out of the usual rule as to the operation of time,) neglects to bring his *quare impedit*, or file a bill in equity, within six months after the time of such usurpation, he will be barred of all remedy. The same rules hold in all these several respects, as between the mortgagor and mortgagee of an advowson; the mortgagee, as having the legal estate, ought to present; (*Croft v. Powell*, Comyn, 609;) the mortgagor, as entitled to the equity of redemption, ought to nominate; but he will lose his right by the same laches which would bar a trustee. (*Gardiner v. Griffith*, 2 P. Wms. 405; *Jory v. Cox*, Prec. in Ch. 71.) The mortgagee even of a bare advowson, and who, consequently, can have no other satis-

faction for his money lent than by presentation, must nevertheless present the nominee of the mortgagor. (*Mackenzie v. Robinson*, 3 Atk. 559; *Gubbins v. Creed*, 2 Sch. & Lef. 218; *Dimock's case*, 2 Freem. 274.)

Mr. Cruise also says (in his Dig. tit. 21, c. 2, s. 41), and cites Wats. Inc. 106, as his authority, that "it has been held, if a patron of a church is a bankrupt, and the church becomes void before the advowson is sold under the commission, the bankrupt shall present or nominate to the church." This statement is rather vague: we have just seen that the rights of presentation and of nomination are distinct things: the bare right to present is merely a ministerial interest; (*Sir George Shirley v. Underhill* and *Burse*, Moor, 894;) but, as we have also seen, the party in whom the legal estate is vested, must present; therefore, after the execution of the usual bargain and sale to his assignees, the bankrupt could not do the ministerial act of presentation; there seem better grounds for allowing him to nominate: for, as the *actual vacancy* could not be sold for the benefit of the creditors, (*Bishop of Lincoln v. Wolforstan*, 3 Burr. 1510, 1512,) and as the bankrupt's estate is vested in his assignees solely for the purpose of paying his debts, it might reasonably be contended, that a beneficial interest, which could not be applied for that purpose, (*Rennell v. The Bishop of Lincoln*, 3 Bing. 236; *Gulley v. The Bishop of Exeter*, 4 Bing. 297,) should be enjoyed by the bankrupt; for who could have a better claim to the disposal of it? (*Gibson*, 794.) An advowson, (setting aside the case of an actual vacancy) is clearly assets for payment of debts, and will be directed by the Court of Chancery to be sold for that purpose. (*Robinson v. Tong*,

fore is synonymous with patronage, *patronatus*: and he who has the right of advowson is called the patron of the church. For, when lords of manors first built churches on their own demesnes, and appointed the tithes (4) of those manors to be paid to the officiating ministers, which before were given to the clergy in common, (from whence as was formerly mentioned (b) arose the division of parishes,) the lord, who thus built a church, and endowed it with glebe or land, had of common right a power annexed of nominating such minister as he pleased (provided he were canonically qualified) to officiate in that church, of which he was the founder, endower, maintainer, or, in one word, the patron (c).

[* 22] This instance of an advowson will completely illustrate the nature of an incorporeal (5) hereditament. It is not itself the bodily possession of the church and its appendages, but it is a right to give some other man a title to such bodily possession. The advowson is the object of neither the sight nor the touch; and yet it perpetually exists in the mind's eye, and in contemplation of law. It cannot be delivered from man to man by any visible bodily transfer, nor can corporal possession be *had of it. If the patron takes corporal possession of the church, the church-yard, the glebe, or the like, he intrudes on another man's property; for to these the parson has an exclusive right. The patronage can therefore be only conveyed by operation of law, by

(b) Vol. I. p. 112.

(c) This original of the *jus patronatus*, by building and endowing the church, appears also to have been al-

lowed in the Roman empire. Nov. 56, t. 12, c. 2; Nov. 118, c. 23. [and see Gibson's Codex, 756.—ED.]

3 P. Wms. 401; *Ripley v. Waterworth*, 7 Ves. 447; *Westfaling v. Westfaling*, 3 Atk. 464.)

A guardian cannot present to an advowson, because he cannot account with his ward in respect thereof. The infant ward must present. (See *ante*, Vol. I. p. 465; 1 Inst. 89 a. 3 Inst. 156; *Shopland v. Ryoler*, Cro. Jac. 99; *Arthington v. Coverley*, 2 Eq. Ca. Ab. 520.)

The right of presentation to a living is mere matter of property; but the

actual possession of a living is not a mere matter of property, but also dependent upon the discretion of the ordinary, who may see just reasons for refusing a presentation. (See *ante*, Vol. I. p. 389; *post*, Vol. III. p. 246; *Newdigate v. Helps*, 6 Mad. 133; 2nd Inst. 631; Mallory's *Quare Impedit*, 87.)

(4) See Vol. I. p. 470.

(5) See *ante*, the note to chap. 2, p. 17; and note (1) to the present chapter.

verbal grant, either oral (6) or written, which is a kind of invisible mental transfer: and being so vested it lies dormant and unnoticed, till occasion calls it forth, when it produces a visible corporeal fruit, by entitling some clerk, whom the patron shall please to nominate, to enter, and receive bodily possession of the lands and tenements of the church.

Advowsons are either advowsons *appendant*, or advowsons *in gross*. Lords of manors being originally the only founders, and of course the only patrons of churches (*d*), the right of patronage or presentation, so long as it continues annexed to the possession of the manor, as some have done from the foundation of the church to this day, is called an advowson *appendant* (*e*): and it will pass or be conveyed, together with the manor, as incident and *appendant* thereto, by a grant of the manor only, without adding any other words (*f*) (7). But where the property of the advowson is *in gross*;

(*d*) Co. Litt. 119.

(*e*) Ibid. 121.

(*f*) Ibid. 307.

(6) A little slip which our author (following Lord Coke, 1 Inst. 120 a) has made here, has been noticed by all his annotators. Blackstone, in all probability, was thinking only of advowsons *appendant*, and of the mode by which they might have been conveyed before the statute of frauds (29 Cha. II. c. 3); up to which period, as the corporeal hereditaments to which they were *appendant* might have passed by a verbal feoffment, with livery, the *appendant* advowson would have passed by the same oral transfer. (*Long v. Hemings*, 1 Leon. 208, and 4 Leon. 216; *S. C. Cro. Eliz.* 209; *Vavasor's case*, 2 Leon. 222.) But our law never permitted an advowson *per se*, or *in gross*, to be passed otherwise than by deed; there are some *opinions* leaning the other way to be found in the Year Books cited in Mallory's *Quare Impedit*, 42, but the *authorities* are all on one side. As a distinct incorporeal hereditament an advowson is incapable of that delivery of possession which, in the old times, was held to give, and per-

haps did give, sufficient notoriety to the transaction; other evidence, therefore, of the transfer of an advowson was properly required. Even the next avoidance of a church cannot be granted without a deed. (*Crisp's case*, Cro. Eliz. 164.) As to the different modes by which such incorporeal hereditaments as advowsons *in gross* may, at the present day, be transferred, see *ante*, note (1) to this chapter. An advowson *appendant* may still be transferred by any kind of conveyance which transfers the manor or demesnes to which it is *appendant*. (See a number of cases relating to this matter collected in 1 Rolle's Ab. 230—233.)

(7) In *Whistler's case*, 10 Rep. 64, it was agreed, that, before the statute *de prerogativa*, (17 Edw. II. st. 2, c. 15,) the rule stated in the text applied universally to grants of the king, as well as to grants of private persons; and that if the king had granted a manor to which an advowson was *appendant*, without making mention of the advowson, or without

son has been once separated from the property of the manor by legal conveyance (8), it is called an advowson in gross, or at large, and never can be appendant any more ; but is for the future annexed to the person of its owner, and not to his manor or lands (g).

presentative,

Advowsons are also either *presentative*, *collative*, or *donative* (h). An advowson presentative (9) is where the patron

(g) Co. Litt. 120.

(h) Ibid.

saying the grant of the manor was *cum pertinentiis*, the advowson would pass ; in *Willion v. Berkeley*, 1 Plowd. 243, it is said, on the other hand, that the statute was only a declaration of the common law ; and that, although the grant of every subject is taken most strongly against himself, and most favourably towards the grantee, it is a maxim of the common law, that the king's grant is to be taken most strongly against the grantee ; which maxim applies to the subject in question as well as any other. However this may be, it is quite clear, that since the statute, a grant from the king of a manor, even with its appurtenances, will not pass an appendant advowson, which is not expressly specified in the grant. (*Chancellor of Cambridge v. Walgrave*, Hob. 127, 164.)

(8) For instance, if the manor to which an advowson is appendant, be conveyed away in fee simple, excepting the advowson ; or, *vice versa*, if the advowson be conveyed away without the manor to which it was appendant, the advowson becomes *in gross*. (*Fulmerston v. Stuard*, Dyer, 103 b.) If, upon partition between two coparceners, a manor be allotted to one, and an advowson appendant thereto to another, the advowson becomes, for a time at least, severed from the manor ; but if by the death of one coparcener without issue, the two estates become re-united by law, the advowson which was once severed is now appendant again. (Sir Moyle

Finch's case, 6 Rep. 64 b. *Hartop v. Dalby*, Hetley, 14.) The *dictum* in the text, therefore, which intimates that an advowson which once becomes *in gross*, can never again be appendant, must be qualified. (See Gibson's Codex, 757.) And our author could not mean, that a temporary severance, by a lease for life or years of a manor, with the exception of an appendant advowson, will have the effect of totally destroying its appendant qualities : the contrary doctrine has been established. (*Hartox v. Cock*, Hutt. 89 ; Jenk. Cent. 310, pl. 91.) And where several parties have a right to nominate and present to a church in turns, the advowson may be appendant for one turn, and *in gross* for another. (*Illisfield case*, Dyer, 259 a, pl. 19.)

(9) Formerly, presentation to a church might have been made by parol (Co. Litt. 120) : but, since the statute of frauds, presentation by a subject must be in writing. As presentations by the king, however, are not expressly mentioned in the statute, the privilege of presenting by bare parol still remains to the crown, but is not very likely to be exercised : the usual mode of presentation on the part of the crown is by letters patent. (Mallory's *Quare Impedit*, 83.) The king may revoke his presentation at any time before the induction of his presentee. (*Wright v. the Bishop of Norwich*, 1 Leon. 156.) So, if the king has title to present, by lapse, *hac vice*, and he does present, but his

hath a right of presentation to the bishop or ordinary, and moreover to demand of him to institute his clerk, if he finds him canonically qualified; and this is the most usual advowson. An advowson collative (10) is where the bishop^{collative,} and patron are one and the same person: in which case the bishop cannot present to himself; but he does, by the one act of collation or con*ferring the benefice, the whole that is [*23] done in common cases by both presentation and institution. An advowson donative (11), is when the king, or any sub-^{or donative.}

clerk dies before induction, the king shall present again; for the king ought always to have the full and complete effect of the thing which is due to him. (*Holt's case*, 9 Rep. 132; *Brockham's case*, Litt. Rep. 135.) But after presentation, admission, and institution, the church is full against every subject, before induction. (*Hutchins v. Glover*, Cro. Jac. 463.) Before admission, a subject may vary his presentation, so far as to present a second clerk, and the ordinary may admit which of the two he pleases (*Mallory's Quare Impedit*, 84): but whether the first presentation may be absolutely revoked, seems not well settled. (*Stoke v. Sykes*, Latch, 191, 253.) As to the grounds upon which the ordinary may be justified in refusing to accept a presentation, see *Specot's case*, 5 Rep. 58, and *Mallory's Quare Impedit*, 87; see also post, Vol. III. p. 246; ante, note (3) to this chapter. By the common law, all patrons have six months allowed to determine on their presentation, before a lapse will occur. (Doctor and Student, chap. 36, part 2.) And a *caveat* may be entered by the patron to prevent the bishop from hastily admitting a clerk presented by one who is not in truth the patron. (Degge, part 1, c. 3; see post, p. 277.)

(10) As the Bishop *collates* to benefices which are *pleno jure* in his own gift, so he doth to those which fall to him by lapse. (Johnson's Eccles. L. 81; Watson, c. 15.)

(11) Watson says, (in the 15th ch.

of his Comp. Inc.) not only a church or chapel, but all sorts of ecclesiastical preferments, may be *donative*. Bishopricks were donative until the time of king John. Some prebends are still donative; as those in the Royal Chapels at Windsor and Westminster, which the king may confer by patent; and his clerk may take possession without any institution or induction. A nomination, however, to a perpetual curacy is not strictly a donative; for, though it requires neither presentation, institution, nor induction, the curate must be authorized by a license from the bishop before he can legally officiate; whereas possession by donation receives its full effect from the sole authority of the donor. (*Bowell v. Milbank*, 1 T. R. 401, n. *The King v. Bishop of Chester*, 1 T. R. 403.) Degge, (in his Pars. Couns. p. 1, c. 13,) informs us, that "donatives are within the statute against simony; and where they have cure of souls, they are likewise within the statute of pluralities." And the same doctrine as to simony is judicially laid down in *Bawderock v. Mackellar*, Cro. Car. 331; and *Carver v. Pinkney*, 3 Lev. 83. Mr. Wooddeson, however, (in his Lect. Vol. I. p. 330,) observes, the words of the statute apply only when the donative is the *first* living taken; if it be the *second*, as it requires neither *institution* nor *induction*, the case is out of the statute. (See 21 Hen. VIII. c. 13.) Still, by the canon law, the incumbent will be

ject by his license, doth found a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron; subject to his visitation only, and not to that of the ordinary; and vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction (*i*). This is said to have been anciently the only way of conferring ecclesiastical benefices in England; the method of institution by the bishop not being established more early than the time of Archbishop Becket, in the reign of Henry II. (*k*). And therefore, though Pope Alexander III. (*l*) in a letter to Becket, severely inveighs against the *prava consuetudo*, as he calls it, of investiture conferred by the patron only, this however shows what was then the common usage. Others contend that the claim of the bishops to institution is as old as the first planting of Christianity in this island, and in proof of it they allege a letter from the English nobility to the pope in the reign of Henry the Third, recorded by Matthew Paris (*m*), which speaks of presentation to the bishop as a thing immemorial. The truth seems to be, that where the benefice was to be conferred on a mere layman, he was first presented to the bishop, in order to receive ordination, who was at liberty to examine and refuse him; but where the clerk was already in orders, the living was usually vested in him by the sole donation of the patron; till about the middle of the twelfth century, when

(*i*) Co. Litt. 344.

(*k*) Seld. Tith. c. 12, s. 2.

(*l*) Decretal, l. 3, t. 7, c. 3.

(*m*) A. D. 1239.

prevented from holding both benefices, unless he has a dispensation. (Ayliffe's *Parerg.* 418; Lindw. lib. 3, tit. 5, c. 2.) A donative does not lapse in consequence of remaining void, unless it be so specially provided for in the foundation (see *post*, p. 276): the bishop may, however, by spiritual censures, compel the patron to nominate a clerk. (1 Inst. 344; Wats. c. 12; *Fairchild v. Gayre*, Yelv. 61.) But if a donative be augmented by Queen Anne's bounty, it will lapse in like manner as presentative livings. (1 Geo. I. st. 2, c. 10.) The prero-

gative of the crown in presenting to benefices where it has promoted the last incumbent, does not extend to donatives; for the promotion doth not make a vacancy of the donative, it causes no cession, the parson is still in by the authority of the patron. (*Bishop of London v. Attorney General*, Show. P. C. 184.) Presentation to a donative by a stranger, and admission and institution thereupon, are acts not merely voidable but of no effect *ab initio*. (1 Inst. 344. See Vol. III. p. 250, n.)

the pope and his bishops endeavoured to introduce a kind of feudal dominion over ecclesiastical benefices, and, in consequence of that, began to claim and exercise the right of institution universally, as a species of spiritual investiture.

However this may be, if, as the law now stands, the true patron *once* waves this privilege of donation, and presents to the bishop, and his clerk is admitted and instituted, the *advowson is now become for ever presentative, and shall never be donative any more (n) (12). For these exceptions to general rules and common right are ever looked upon by the law in an unfavourable view, and construed as strictly as possible. If therefore the patron, in whom such peculiar right resides, does once give up that right, the law, which loves uniformity, will interpret it to be done with an intention of giving it up for ever; and will therefore reduce it to the standard of other ecclesiastical livings. [* 24]

II. A second species of incorporeal hereditaments is that of tithes; which are defined (13) to be the tenth part of the II. Tithes :

(n) Co. Litt. 344; Cro. Jac. 63.

(12) Degge, 205, is in accordance with the text; and though in the case of *Ladd v. Widdows*, (2 Salk. 541; 3 Salk. 140; Holt's Rep. 259;) a donative was held not to be destroyed by one, or by several, presentations; still, it does not clearly appear from the reports, that the *dictum* is to be understood generally; on the contrary, as the court, in the case cited, assigns as the reason for the judgment then given, that *the donative was created by letters patent*; the inference should rather seem to be, that with respect to donatives which are such merely by prescription, by repeated interruptions (if not by a single voluntary one) the prescriptive title would be lost.

(13) The definition proposed in the text is not strictly accurate. Ayliffe (in his *Parerg. Ju. Can.* 504) observes, "tithe is a certain *quota* or portion of moveable goods; I say a *quota* or certain portion, because tithe is not in all places the tenth part, but various

according to the custom of parishes." (And see *Doct. and Student*, c. 55.) This objection, however, is not of great weight, for, whatever may have been the case in other times and countries, with us the word tithe has acquired a fixed meaning. It is believed, there is no instance in which more than a tenth is here paid as tithe, *eo nomine*; and that a parson shall take less than a tenth part of any specific article, having a compensation in the parishioner's work and labour, by no means disproves the parson's right to a full tenth, but shows that he receives a consideration, which is in fact an acknowledgment of that right. (*Smyth v. Sambrook*, 1 Mau. & Sel. 73. *Jackson's case*, Clayton, 60.) The faulty part of the definition seems to be the supposition that tithe consists, in all cases, of the tenth part of the increase *yearly* arising and renewing. This is not correct, even as to predial tithes, universally; and to mixed and personal tithes it does

predial,

mixed,

personal.

increase, yearly arising and renewing from the profits of lands, the stock upon lands, and the personal industry of the inhabitants: the first species being usually called *predial*, as of corn, grass, hops and wood (*o*) (14): the second *mixed*, as of wool, milk, pigs, &c. (*p*), consisting of natural products, but nurtured and preserved in part by the care of man (15); and of these the tenth must be paid in gross: the third *personal*, as of manual occupations, trades, fisheries, and the like; and of these only the tenth part of the clear gains and profits is due (*q*) (16).

(*o*) 1 Roll. Abr. 635; 2 Inst. 649.

(*p*) Ibid.

(*q*) 1 Roll. Abr. 656.

not at all apply. (See the 4th ch. of Toller on Tithes.)

(14) Wood is one of the instances to show that predial tithe may be payable in respect of an article of which the renewal is not annual. *Silvacædua* is titheable when it is felled; and, between the falls several years commonly (and a great many years, not unfrequently) intervene. (*Page v. Wilson*, 2 Jac. & Walk. 523; *Walton v. Tryon*, 1 Dick. 245; *Chichester v. Sheldon*, Turn. & Russ, 249.)

(15) Burn, Watson, Wood, Degge, Toller, and other writers on tithe, speak of mixed tithe, not as something bearing a mixed character, partaking partly of the qualities of predial, and partly of the qualities of personal tithe; but as tithe arising, not immediately from the ground, but mediately from animals which have their nourishment from the ground. Many of the subjects of mixed tithe seem to be most correctly included in the last description, though the appellation "mixed," would lead one, *à priori*, to expect that our author's definition would be found most correct. Perhaps, neither definition is positively incorrect, as far as it goes; but both may be incomplete.

(16) By the statute of 2 & 3 Edw. VI. c. 13, s. 7, it is enacted, that "every person who heretofore within

forty years has accustomedly used to pay personal tithes, shall, yearly at Easter, pay for his personal tithes the tenth part of his clear gains." This act greatly curtailed the claim to personal tithe; the 11th section of the statute preserved to the church, however, the right of tithe of fish, taken in the sea. According to Lindw. 195, and Wood, b. 2. c. 22, this tithe is payable where the fisherman hears divine service and takes the sacrament. (See also the *Anonymous case*, Cro. Car. 264; *The King v. Carlyon*, 3 T. R. 386; *Scarborough v. Hunter*, Bunb. 43; *Gwavas v. Kelynack*, Bunb. 256; and *Anon. Hetley*, 13; but if, as appears to be the case, it is a tithe due by custom only, custom must determine to whom it ought to be paid. Stat. 27 Hen. VIII. c. 20.) With respect to fish taken in rivers, it seems settled, that tithes are not payable except by custom. (*Dawes v. Huddleston*, Cro. Car. 339.) And of fish taken out of ponds, not for sale, but for consumption in the proprietor's own family, no tithe is due. (Bohun, 135.)

It was decreed in the House of Peers, on appeal from the Court of Exchequer, that the tithes of a mill are personal tithes, against several *dicta* in the books; and that, in consequence of their being personal tithes,

It is not to be expected from the nature of these general commentaries, that I should particularly specify what things are titheable, and what not; the time when, or the manner and proportion in which, tithes are usually due. For this I must refer to such authors as have treated the matter in detail: and shall only observe, *that, in general, tithes are to be paid for every thing that yields an annual increase, as corn, hay, fruit, cattle, poultry, and the like; but not for any thing that is of the substance of the earth, or is not of annual (17) increase, as stone, lime, chalk, and the like; nor for creatures that are of a wild nature, or feræ naturæ (18), as deer, hawks, &c. whose increase, so as to profit the owner, is not annual, but casual (r).* It will rather be our business

(r) 2 Inst. 651.

not the tenth toll, or tenth dish of the corn ground, belongs to the parson; but the tenth part of the clear profits, after the charges of erecting the mill, and the other charges of servants, horses, and other incidental expenses deducted. (*Chamberlain v. Newte*, 1 Br. P. C. 160, fol. edit.; *Manby v. Curtis*, 2 Pr. 295.)

It appears, then, that for all corn mills, however ancient, if they have been accustomed to pay tithe, and for all corn mills erected since the statute, tithes must be paid. But where the date of the first erection of an ancient mill is not known, and it has never been subject to the payment of tithes, it will, in legal intendment, be taken to have been erected *before the statute*, and so to be tithe free. (*Bohun*, 127; *Hughes v. Billingham*, 2 Gwill. 644; and see 2 & 3 Will. IV. c. 100.) However, if any additional pairs of stones are added to an ancient mill, it seems now settled, after considerable fluctuation of judicial opinion, that tithe must be paid in respect of the increased quantity of corn ground. (*Manby v. Taylor*, 3 Ves. & Bea. 71.) Corn mills only are regularly subject to payment of personal tithe; but, by custom, tithe may be payable for mills

of any other description. (Gibs. 666; *Talbot v. May*, 3 Atk. 18.)

Besides the distinctions of tithe noticed in the text, as predial, mixed, and personal, there is another division of them into *great* and *small* tithe, which will be adverted to, *post*, in the note to p. 28.

(17) See *ante*, notes 13 and 14 to this page, that this description holds good generally, but not universally.

(18) By special custom, tithe may be payable in respect of animals *feræ naturæ*. Custom, if well established, and not inconsistent with positive law, or public policy, is conclusive upon all questions of tithe. (See stat. 27 Hen. VIII. c. 20.) Perfectly wild rabbits, in which no man has a fixed property, are not titheable of common right, when taken. (*Worden v. Benet*, 1 Rolle's Abr. 635.) Even of rabbits preserved in a warren, and which are strictly private property, it seems, no tithe can be demanded, except by custom: but a claim to tithes in kind of rabbits from a warren, or to a *modus* for them, may be established by proof of a custom. (*Walton v. Tryon*, 1 Dick. 248; *Ambl.* 135.)

to consider, 1. The original of the right of tithes. 2. In whom that right at present subsists. 3. Who may be discharged, either totally or in part, from paying them.

The origin of tithes.

1. As to their original, I will not put the title of the clergy to tithes upon any divine right (19), though such a right certainly commenced, and I believe as certainly ceased, with the Jewish theocracy. Yet an honourable and competent maintenance for the ministers of the gospel is, undoubtedly, *jure divino*; whatever the particular mode of that maintenance may be. For, besides the positive precepts of the new (20) testament, natural reason will tell us, that an order of men, who are separated from the world, and excluded from other lucrative professions, for the sake of the rest of mankind, have a right to be furnished with the necessaries, conveniences, and moderate enjoyments of life, at their expense, for whose benefit they forego the usual means of providing them. Accordingly, all municipal laws have provided a liberal and decent maintenance for their national priests or clergy: ours in particular have established this of tithes, probably in imitation of the Jewish law: and perhaps, considering the degenerate state of the world

(19) The excellent Bishop Latimer, however, hardly deserved to be called a mere "dreamer," (as he is by the author of *Grounds and Rud. of Law & Eq.*, p. 337,) for having followed all the judges and serjeants of the Court of Common Pleas, (see *Dyer*, 43 a,) and all the justices of the Court of King's Bench, (see *Parkins v. Hinde*, Cro. Eliz. 161,) in referring the right of tithe in the English, (as was clearly the case with respect to the Jewish) priesthood, to a divine original. When backed by such high lay authority, it was hardly to be expected, that churchmen should have been the first to reduce their claim to a lower, though safer and more tenable ground. Yet, whilst the chief sages of our law still held tithes to be due *jure divino*, Wickliffe published the doctrine, that "tithes were merely alms, and by no means of gospel institution." The Jewish theo-

cracy apart, it has since been proved, by the learned Selden, (*Tr. on Tithes*, c. 5,) that "the payment of tithe to the Christian church cannot be dated further back than the close of the 4th century." (See also *Prideaux on Tithes*, 139.)

(20) Rayner, (*Introduc.* ii.) observes, that "our author might have referred to the *Old*, more properly than to the *New Testament*." The latter, indeed, it is believed, affords no positive precepts on the subject: but Rayner refers to the following authorities in the Old Testament: *Levit.* xxvii. 32. *Numb.* xxiv. 28. *Deut.* xii. 6, 11, 12, 13, 28; xxvi. 12. *2 Chron.* xxxi. 5, 6, 12. *Nehem.* x. 37, 38; xiii. 5, 12. *Amos* iv. 4. *Mal.* iii. 8, 10. A similar remark had previously been made by Ayliffe. (*Parerg.* 505.)

in general, it may be more beneficial to the English clergy to found their title on the law of the land, than upon any divine right whatsoever, unacknowledged and unsupported by temporal sanctions (21).

We cannot precisely ascertain the time when tithes were first introduced into this country. Possibly they were con-
Their first introduction into this country.
 temporary with the planting of Christianity among the Saxons, by Augustin the monk, about the end of the sixth century (22). But the first mention of them, which I have met with in any written English law, is in a constitutional decree, made in a synod held A. D. 786 (s), wherein the payment of tithes in general is strongly enjoined. This canon, or decree, which at first bound not the laity, was effectually confirmed by two kingdoms of the heptarchy, in

(s) Selden, c. 8, s. 2.

(21) "In point of natural justice, it is clear, that the clergy have a claim to some public provision, and tithes are the species of such provision prescribed by the municipal law; the foundation is sufficiently solid on which to rest their title." (Toll. on Tithes, 11, citing *Sims v. Bennet*, Gwill. 887.)

(22) Upon the passage in the text, Toller (s. 3, p. 6) observes, "if the only ground for the surmise is, that the payment was commonly urged and inculcated from scriptural texts, as consonant to the divine code, then, it may be referred, with equal probability, to a much earlier period than that of Augustin's mission from Gregory the great: for, Christianity prevailed generally among the Britons, and many ecclesiastical synods were holden here anterior to the Saxon dynasty." Any reader, who is disposed to pursue this subject further, (and, it is believed, whoever does so will find the trouble of examination repaid by the interesting nature of the information he will acquire,) may discover incidental illustrations of it in Tertullian, Origen, Eusebius, Theodoret,

Clemens Romanus, &c., or, without the labour of examining these original authorities, he may find summaries thereof in the introduction to Camden's *Britannia*, in Usher's *Antiq. Brit. Eccles.*, in Stillingfleet's *Orig. Brit.*, and as popular (perhaps as judicious) a one as any, in the second section of the second chapter of Henry's *Hist. of England*. The short result is, that the truths of Christianity were acknowledged in this country, by some converts, as early as the time of the Apostles; and that, as three bishops of the British nation assisted at the Council of Arles, A. D. 314, the Christian Church must have obtained an establishment here for some time (in all probability for a considerable time) previously, though the precise date cannot now be discovered. It would, no doubt, be an error to suppose that the title of bishop, in those early days, implied any thing like the temporal distinction and wealthy endowment which, at present, accompanies that spiritual rank. Still, the appointment of bishops denotes a recognized establishment. See Vol. IV. p. 105.

[* 26]

their parliamentary conventions of estates, respectively consisting of the kings of Mercia *and Northumberland, the bishops, dukes, senators, and people. Which was a very few years later than the time that Charlemagne established the payment of them in France (*t*) (23), and made that famous division of them into four parts; one to maintain the edifice of the church, the second to support the poor, the third the bishop, and the fourth the parochial clergy (*u*).

The next authentic mention of them is in the *feodus Edwardi et Guthruni*; or the laws agreed upon between king Guthrun the Dane, and Alfred and his son Edward the elder, successive kings of England, about the year 900. This was a kind of treaty between those monarchs, which may be found at large in the Anglo-Saxon laws (*w*): wherein it was necessary, as Guthrun was a pagan, to provide for the subsistence of the Christian clergy under his dominion; and, accordingly, we find (*x*) the payment of tithes not only enjoined, but a *penalty* added upon non-observance: which law is seconded by the laws of Athelstan (*y*), about the year 930. And this is as much as can certainly be traced out, with regard to their legal original.

To whom tithes
are due.

2. We are next to consider the persons to whom they are due. And upon their first introduction, as hath formerly been observed (*z*), though every man was obliged to pay tithes in general, yet he might give them to what priests he

(*t*) A. D. 778.

(*u*) Book i. c. 11. Seld. c. 6, s. 7.
Sp. of Laws, b. 31, c. 12.

(*w*) Wilkins, p. 51.

(*x*) Cap. 6.

(*y*) Cap. 1.

(*z*) Book i. Introd. s. 4.

(23) With respect to the quadripartite division of tithes mentioned in the text above, and in Vol. I. p. 385, Toller (p. 6) thinks it was not only more ancient than the law of Charlemagne upon the subject, but also conformable to some very old canon or usage. He draws this inference, reasonably enough, from the answer returned to Augustine, who, when he inquired of the Pope as to the bishop's portion of the oblations of the faithful, was told, that the *custom* was, generally, to make such a division as

that alluded to:—a division which has very long been disregarded. With the exception of the chancel, which the rector is still bound to repair, no part of the tithes is, at the present day, applicable to the maintenance of the church. The *quantum* devoted to the poor, depends entirely upon the voluntary charity of the incumbent. And the bishop no longer looks, for the due support of his rank, to a participation in the tithes paid to the parochial clergy.

pleased (a) (24); which were called *arbitrary* consecrations of tithes: or he might pay them into the hands of the bishop, who distributed among his diocesan clergy the revenues of the church, which were then in common (b). But, when dioceses were divided into parishes, the tithes of each parish were allotted to its own particular minister; first by common consent, or the appointment of lords of manors, and afterwards by the written law of the land (c).

*However, arbitrary consecrations of tithes took place again afterwards, and became in general use till the time of King John (d). Which was probably owing to the intrigues of the regular clergy, or monks of the Benedictine and other rules, under Archbishop Dunstan and his successors: who endeavoured to wean the people from paying their dues to the secular or parochial clergy (a much more valuable set of men than themselves), and were then in hopes to have drawn, by sanctimonious pretences to extraordinary purity of life, all ecclesiastical profits to the coffers of their own societies. And this will naturally enough account for the number and riches of the monasteries and religious houses, which were founded in those days, and which were frequently endowed with tithes. For a layman, who was obliged to pay his tithes somewhere, might think it good policy to erect an abbey, and there pay them to his own

[* 27]

(a) 2 Inst. 646. Hob. 296.

(b) Seld. c. 9, s. 4.

(c) LL. Edgar, c. 1 & 2. Canut. c. 11.

(d) Seld. c. 11.

(24) Prideaux, (p. 302,) controverts this. His arguments, however, are feeble; and Burn, though he cites them, lays no stress upon them. A man might be at liberty to pay tithe to another than the minister of the nearest adjoining church, yet, that minister might compel payment to himself, unless the payment to another was proved. And the general discretion allowed, as to the choice of the party to whom tithe should be paid, might be superseded by a special appropriation, made by a competent authority, in favour of a certain individual, or particular ecclesiastical

corporation. The objections of Prideaux cannot displace the authority cited by Lord Coke, (from the Regist. Brev. 36 b) of the writ in which Edw. III. says, "*quia decimas conferimus in quibusdam dominicis, et similiter magnates regni in dominicis suis, vobis prohibemus, ne aliquid quod in derogationem dignitatis nostræ cedere valeat in hac parte attentetis, quovismodo.*" Lord Coke seems fully justified in inferring from this writ, that, at that time, both the king and his subjects might give their tithes to what spiritual person they would. (And see Lindw. 117; see also Vol. I. p. 386.)

[* 28]

monks; or grant them to some abbey already erected: since, for this dotation, which really cost the patron little or nothing, he might, according to the superstition of the times, have masses for ever sung for his soul. But, in process of years, the income of the poor laborious parish priests being scandalously reduced by these arbitrary consecrations of tithes, it was remedied by Pope Innocent the third (*e*) about the year 1200, in a decretal epistle sent to the Archbishop of Canterbury, and dated from the palace of Lateran: which has occasioned Sir Henry Hobart and others to mistake it for a decree of the Council of Lateran held A. D. 1179, which only prohibited what was called the infeodation of tithes, or their being granted to mere laymen (*f*); whereas this letter of Pope Innocent to the archbishop enjoined the payment of tithes to the parsons of the respective parishes where every man inhabited, agreeable to what was afterwards directed by the same pope in other countries (*g*). This epistle, says Sir Edward Coke (*h*), bound not the lay subjects of this realm: but, being reasonable and just, (and, he might have *added, being correspondent to the ancient law (25), it was allowed of, and so became *lex terræ*. This put an effectual stop to all the arbitrary consecrations of tithes; except some footsteps which still continue in those portions of tithes, which the parson of one parish hath, though rarely, a right to claim in another (26); for it is now universally held (*i*), that tithes are due, of common right, to the parson of the parish, unless there be a special ex-

(*e*) Opera Innocent. III. tom. 2, p. 452.

(*f*) Decretal, l. 3, t. 30, c. 19.

(*g*) Ibid. c. 26.

(*h*) 2 Inst. 641.

(*i*) Regist. 46. Hob. 296.

(25) Our author, of course, does not mean to contradict here, what he advanced two pages before, as well as in Vol. I. pp. 111, 112, namely, that the *most* ancient law of this country respecting payment of tithe, allowed every man to pay to what church or parish he pleased. See the last note and the next.

(26) "A *portion* of tithes, means a profit of tithes which a man hath within the parish of another parson or

vicar, and its origin must have been in times when it was lawful for every one to distribute, and pay as he chose, his tithes, or any portion thereof, to any church according to his best devotion; and there was no restraint to any church or parish in certain; so, by continuance, that grew to a right and title." (*Dean and Chapter of Bristol v. Clarke*, Dyer, 84 b; Gibson's Codex, 663. See Vol. I. p. 113.)

emption (27). This parson of the parish, we have formerly seen (*k*), may be either the actual incumbent, or else the

(*k*) Book i. p. 385.

(27) See the last note. It must also be recollected, that some lands are still extra-parochial, and to the tithes arising from such lands, the king is entitled. Moreover, lands lying within a royal forest do not pay tithes, although they be within a parish. (*Banister v. Wright*, Styles, 137. 1 Roll. Abr. 657.)

All spiritual persons and corporations were capable of having their lands, whether in their own occupation or not, totally discharged from payment of tithe, either by real composition, (*Donison v. Elsley*, 1 M'Clel. & Younge, 23,) by prescription, (*Markham v. Smith*, 12 Pr. 131; *Clavill v. Oram*, 3 Eag. & Y. 189,) or by a papal bull of exemption, in cases where such bull was once legally recognized in this country. (*Wright v. Hildersham*, Hob. 309; *Page v. Wilson*, 2 Jac. & Walk. 528; *Townley v. Tomlinson*, 2 Eag. & Y. 189.) And where lands appear to have been before, and at the time of, the council of Lateran, (*Staveley v. Ullithorne*, Hard. 101,) part of the possessions of any of the greater monasteries, suppressed in the time of Henry VIII., and to have remained so till the dissolution; (*Norton v. Hammond*, 1 Younge & Jerv. 108; *Willis v. Farrer*, 2 Y. & J. 236;) and there is no evidence of the payment of tithes for those lands at any time, our courts, (even before the recent statute of 2 & 3 Gul. IV. c. 100,) considered them as discharged, by some way or other, before the dissolution. (*Lamprey v. Rooke*, Amb. 291.) It was said, however, that as privilege of order was the most common mode of exemption, *that* must be presumed to have been the original ground of discharge, unless some other is proved.

(*Bury St. Edmund's* case, Comyn, 655; *Page v. Wilson*, 2 Jac. & Walk. 522; *Bowles v. Atkins*, 2 Keb. 162, 175; *Sydown v. Holmes*, Cro. Car. 423; but see *Ingram v. Thackston*, 3 Eag. & Y. 1242.) And the privilege of exemption from payment of tithe, when claimed by ecclesiastical communities merely *ratione ordinis*, was restricted to lands in their own manurance and occupation. (*Young v. Naylor*, 2 Eag. & Y. 349; *Slade v. Drake*, Hob. 296.)

The king may prescribe *de non decimando*, and so may tenants of the royal demesnes; as may a bishop, and his tenants (see *post*, p. 31, note.) The cases, also, of tenants of certain estates which formerly belonged to religious houses, are exceptions to the general rule, that laymen cannot prescribe *de non decimando*; (*Branche's* case, Moor, 219; *Clavill v. Oram*, 3 Eag. & Y. 1370;) for this right was, at the dissolution of the greater abbies, reserved to the crown, and its grantees, by the statute of 31 Hen. VIII., confirmed by 2 & 3 Edw. VI. c. 13; but to support the prescription, (before the late statute of 2 & 3 Gul. IV. c. 100,) the lands to which it applied must have been shown, by competent evidence, to have been possessed by the suppressed religious house, before the council of Lateran, A. D. 1215. (*Markham v. Smyth*, 11 Price, 131; *Norton v. Hammond*, 1 Younge & Jerv. 103.) However, usage, which could not be legally accounted for on any other hypothesis, was held to afford such competent evidence; (*Donnison v. Elsley*, M'Clel. & Y. 24;) and when a man occupied lands which came to the crown at the dissolution, discharged from tithes, and such property

appropriator of the benefice; appropriations being a method of endowing monasteries, which seems to have been devised

had been the subject of ordinary transfer, by the same sort of conveyances as lay fees, Courts of Equity would lend no assistance to disturb the possession, by putting the occupier to prove the commencement of the title (*Williams v. Bacon*, 1 Sim. & Stu. 418), but sent the party claiming tithe to make out his case at law. (*Berney v. Harvey*, 17 Ves. 127.) Unity of possession, at the time of the dissolution, in the reign of Henry VIII. of a parsonage, and of lands which would otherwise have been liable to pay tithes thereto, always afforded a *prima facie* evidence of an immemorial prescription *de non decimando*, if the union could not be shown to have taken place within time of memory, and there was no evidence of tithes having ever been paid; (Peake's Law of Evid. 416, 417. *Doubitofte v. Curteene*, Cro. Jac. 454;) though a legal foundation for the presumption must, of course, have been first laid, by satisfying the Court which had to decide upon the question, that such unity of possession did, at all events, exist at the time of the dissolution; (Phillips on Evid. c. 7, s. 7;) but, we have just seen, Courts of Equity were not technically precise and rigid with respect to the evidence which they required on this head. Mere unity of possession, however, when the union cannot be proved to have taken place within time of memory, wants the most essential quality of a prescription, as the limits of prescription were understood before the statute already referred to, passed. (Case of the *Abbot of Tewkesbury*, cited in *Prowse's* case, 4 Leon. 47.) Whenever the right to tithes, and the occupation of the land whence they arise, unite, a suspension of actual payment must, no doubt, result; but, (previously to the late act,) unless the

unity of possession had been in fact, or according to legal presumption, *perpetual*, the abstract right to tithes was held to subsist; and the distinct actual enjoyment thereof was revived, whenever the possession was severed. (*Fox v. Bardwell*, Com. 511; *Anon. Dyer*, 43 a.) The 5th section of the statute of 2 & 3 Gul. IV. c. 100, enacts, that the time during which lands shall be holden by persons entitled to the tithes thereof shall be excluded, when computing the periods necessary to give validity to prescriptions, and claims of *modus*. And as the tithes in such cases are considered as an interest subsisting independently, notwithstanding the unity of possession of the land; a previously established *modus*, though its payment must, of course, be suspended, will not be destroyed by such unity of possession. (*Chambers v. Hanbury*, Moor, 528.)

It has been said, that a county, or hundred, or district, may prescribe *in non decimando*, but this is much too broadly laid down. With respect to articles which are titheable *de jure*, no such prescription, in any sense of the word, holds. To a claim of tithe of articles which are only titheable by custom, indeed, a custom *de non decimando* is, of course, the best answer which can be given; but this is not prescribing for a *privilege* of exemption, it is merely asserting that the common law rights of the parties are *not* affected by any prescriptive usage. (*Hicks v. Woodeson*, 4 Mod. 344; *Page v. Wilson*, 2 Jac. & Walk. 523.) In no other cases, but those above-mentioned as cases of exception, can a prescription *in non decimando* be set up in bar of the claim of tithes; (*Fanshaw v. Rotherham*, 1 Eden, 292; *Heathcote v. Aldridge*, 1 Mad. 243;) for these belong, of common right, to

by the regular clergy, by way of substitution to arbitrary consecrations of tithes (*l*).

(*l*) In extra-parochial places, the king, by his royal prerogative, has a right to all the tithes. (See Book i. p. 113, 284.)

the parson of the parish in which the titheable things are produced; and, equally so, whether he be spiritual rector or lay impropriator. (*Meade v. Norbury*, 2 Pr. 345; *S. C.* 3 Bligh, 224, 252, 272; *Nagle v. Edwards*, 3 Anstr. 705; *Boulton v. Richards*, 6 Pr. 493.) A defendant to a bill in equity, brought for tithes in kind, may, no doubt, have the benefit of a composition real, if he can show it to have had existence; (*Bennet v. Skeffington*, 4 Pr. 146;) and to have been duly entered into, with the concurrence of all proper parties; (see the 2nd section of the act of 2 and 3 Gul. IV. c. 100;) provided also he put this defence properly on the record. (*Sherwood v. Winchcombe*, Cro. Eliz. 293; *Sands v. Drury*, Cro. Eliz. 814.) But, as there is a clear distinction with respect to the evidence by which a *modus* and a composition real may be supported, the occupier of land must not lull the tithe owner into security, by giving him reason to suppose no other defence than that of *modus* will be set up. (*Bennet v. Neale*, Wightw. 362; *Miller v. Jackson*, 1 Y. & J. 90; *Page v. Wilson*, 2 Jac. & Walk. 533.) It is true that a *modus* may have originated, it is even probable that most *moduses* did originate, in a composition; (*Chapman v. Monson*, 2 P. Wms. 573;) but then, a *modus* must (before the late statute, so often already referred to,) have been proved to have had existence from the remotest time of legal memory; whilst a real composition, insisted on as such, must have commenced within time of memory, and its commencement must be proved; it is not, indeed, absolutely necessary to produce the deed of composition,

when it can be inferred, from satisfactory evidence, that it did once exist; (*Haws v. Swaine*, 2 Cox, 179; *Chatfield v. Fryer*, 1 Pr. 256; *Heathcote v. Mainwaring*, 3 Br. 217;) but still, a defendant who insists on a real composition, cannot allege mere non-payment as evidence that such a deed once existed. (*White v. Lisle*, 3 Swanst. 346; *Bullen v. Michell*, 2 Pr. 399; *Bolton v. The Bishop of Carlisle*, 2 H. Bla. 263.) Retainer of tithes, (unless such retainer has continued the full period declared to be necessary by the act of 2 & 3 Gul. IV. c. 100) will not, alone, justify a presumption, that a legal grant thereof must, at some time, have been made; it will be necessary also to show the actual pernanacy and receipt of the tithes, as an interest distinct from, and independent of, title to the land from which they accrue. (*Scott v. Airey*, 3 Gwill. 1174; *Heathcote v. Aldridge*, 1 Mad. 244; *Meade v. Norbury*, 2 Pr. 366.)

If a defence of composition real might be supported by evidence of usage, so as to give it the character of a *modus*, no defendant in a tithe suit, before the late act, would ever have been advised to plead a *modus*; when, by pleading at once a composition real, he could have had the advantage of showing non-usage, and would also have got rid of any objection on the score of rankness; (*Ward v. Shepherd*, 3 Price, 625; *Estcourt v. Kingscote*, 4 Mad. 141;) which objection, if made out, was fatal, before the late act. There is an established barrier separating *modus* (considered as a *prescriptive* payment) from composition real, (which must have had its origin under an *instrument* made within time of memory;) the two de-

Lands and their occupiers may be exempted from the payment of tithes, in part or totally.

3. We observed that tithes are due to the parson of common right, unless by special exemption; let us therefore see,

fences differ, both as to their nature and as to the proof by which they must respectively be supported: (see the next note :) and, as a general rule, a court of equity will not direct an issue to try a composition real, when the defendant in the suit has, by his answer, only alleged a *modus*. (*Bennet v. Neale*, Wightw. 361; *Haws v. Swaine*, 2 Cox, 179.) However, where there has been a mere oversight in the form of laying a *modus*, but the mistake does not, in point of fact, materially affect the substance and nature of the defence, courts of equity have sometimes directed an issue according to the truth of the case; (*Prevost v. Bennet*, 1 Pr. 239; *Mallock v. Browse*, Ambl. 423; *Blake v. Veysie*, 3 Dow, 191;) and it seems not inadmissible to lay a defence in the alternative; it is, at least, a course exempt from the objection of being a surprise practised upon the tithe owner. (*Leach v. Bailey*, 6 Pr. 508.)

A *modus* was termed *rank*, when its amount is so large as to have greatly exceeded the value of the tithes at the period when Richard I. departed on his crusade (A. D. 1189), from which period the date of legal memory was, in all cases, formerly held to commence; and the recent statute of 2 Gul. IV. c. 71, which shortened the time of prescription in certain cases, expressly excepted questions of tithe from the operation of the act; but the statute of 2 & 3 Gul. IV. c. 100, enacted, that "when the render of tithes in kind shall be demanded by any corporation sole, then every prescription or claim of a *modus decimandi*, or of exemption from or discharge of tithes shall be valid and indefeasible upon evidence showing payment or render of the *modus*, or enjoyment of the land without payment or render of

tithes, money, or other matter or thing in lieu thereof, for and during the whole time that two persons in succession shall have held the office or benefice in respect whereof such render of tithes in kind shall be claimed, and for not less than three years after the appointment and institution or induction of a third person thereto. Provided that, if the holding of such two persons shall have been less than sixty years, it shall be necessary to show such payment or render of *modus* made, or such enjoyment had, during such further number of years, either before or after such time, as shall be sufficient to make the full period of sixty years, and also the said further period of three years after the appointment and institution or induction of a third person to the same office or benefice, unless it shall be proved that such payment or render of *modus* was made or enjoyment had by some consent or agreement, expressly made or given for that purpose by deed or writing." And the statute of 3 & 4 Gul. IV. c. 27, after enacting that the word "land" should, in that act, extend to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole), and that the word "rent" should extend to all sums of money payable out of any land (except *moduses* or composition belonging to a spiritual or eleemosynary corporation sole), proceeds further to enact, that no land or rent shall be recovered but within twenty years after the right of action accrued; and that, at the determination of the period limited by the act, not merely the right of action, but the title of the party claiming such land or rent shall be extinguished.

The operation of these acts will, by and by, get rid of all disputes as to

thirdly, who may be exempted from the payment of tithes,

modus, and with them, of course, all questions as to the rankness of moduses; but, as the first of the acts cited may not have its full and complete effect for more than half a century to come, it may not be superfluous to intimate, shortly, some of the leading rules on the subject of rankness.

Rankness is merely evidence, throwing suspicion upon the alleged antiquity of the payment: it forms no objection in point of law to the modus. If that can be shown, or fairly inferred, to have existed immemorially, the seeming exorbitance of the payment forms no legal objection to it. (*O'Conner v. Cook*, 6 Ves. 672; *Chapman v. Smith*, 2 Ves. sen. 515.) The question of rankness, then, is one of fact, rather than of law, and is usually sent to a jury, when the least doubt arises; indeed, a modus was never established *against* a parson, before the late act, without a trial at law, if he desired an issue; (*Short v. Lee*, 2 Jac. & Walk. 497; *Williams v. Price*, 4 Pr. 156;) but, where the rankness of a modus was unquestionable, and the immemorial antiquity of such excess of payment was not satisfactorily established; it was held, beyond all doubt, competent to courts of equity to decide upon such matters of fact, if they thought proper, without sending the case to a jury; and the exercise of this right was, as the law formerly stood, frequently a merciful saving of expense to all the parties. (*Bishop v. Chichester*, 2 Br. 163; *Jee v. Hockley*, 4 Pr. 88; *Fisher v. Lord Graves*, 1 M'Clel. & Y. 379; *Goodenough v. Powell*, 2 Russ. 229.)

The objection of rankness was held more safely applicable, with reference to the value of particular things, for which the modus had been set up, than as a rule for judging of the antiquity of a modus dependent on the value of lands. For instance, where

a sum of money was alleged to be payable for a lamb, or any other particular species of produce, it might be easy enough to ascertain what was, at any period of our history, the value of a lamb, or any similar article; and thence to form a fair conjecture, whether the modus prescribed for in discharge of tithe of such articles, could have had its origin in, or before, the twelfth century. But the value of land in a particular parish, and what compensation *per acre* for tithe it may have been reasonable to give, is a very complicated question. It is at least equally so, when the contest is as to the validity of a farm modus, and the invalidity of such a modus was very rarely, if ever, determined on the ground of rankness, without an issue, if the party setting up the modus desired one. (*Atkyns v. Lord Willoughby de Broke*, 2 Anst. 403; *O'Conner v. Cook*, 6 Ves. 672; 8 Ves. 536; *Chapman v. Smith*, 2 Ves. sen. 514; *White v. Lisle*, 4 Mad. 224; and see *post*, note 31, to p. 29.)

For the encouragement of husbandry, whether the grass growing on the headlands of corn-fields be consumed in its green state, or made into hay, the common law exempts it from payment of tithe, provided the headlands are not of greater extent than is fairly required for turning the plough. The same common law exemption extends to after-pasture, and to agistment of such beasts as the parson hath tithes of, and of the farmer's own beasts of the plough. Wood used in hedging or fencing corn of which the parson has the tithe, or for hop-poles where the parson or vicar has tithe of hops, and generally all wood employed in making or repairing the farmer's own utensils of husbandry, or in burning bricks for the purpose of repairing his homestead within the parish, was formerly held,

and how lands, and their occupiers, may be exempted or

in like manner, to be by the common law exempted from tithe. (2 Inst. 651, 652; *Grysmen v. Lewes*, Cro. Eliz. 447; *Green v. Hun*, Cro. Eliz. 702; *Jouce v. Parker*, Cro. Jac. 575.) With respect to these articles, however, the earlier decisions and *dicta* must now be qualified. In the modern case of *Willis v. Stone*, (1 Younge & Jerv. 274,) Chief Baron Alexander, after reviewing all the leading authorities bearing on the question, declared them to stand opposed to each other. His Lordship added, with respect to the exemption of wood used for hop-poles upon a farm, for hurdles to fold sheep, for repairing hedges, for land-draining on the farm, and for fuel in the husbandry house, in early times, the weight of authority is in favour of the rule being a rule at common law; but in after times the weight of authority is the other way. The alleged principle, that, by such an application of the article in question, the incumbent receives *uberiores decimas*, proves too much. The whole produce of the farm, consumed in the house, would be exempt upon the same ground. Besides, tithes are due the moment the produce is severed and can be conveniently divided; therefore, the subsequent use of the article, not perhaps to be determined for months, ought not to determine the liability to tithe. Lord Hardwicke, (in *Walton v. Tryon*, 1 Dick. 245,) had previously said, "the subsequent use of a thing cannot add or take away a titheable quality; a case may, indeed, be put, where the use determines whether a thing is titheable, viz. where wood is cut to be burnt in the house of a parishioner, within the parish, in which case it is not liable to tithe; but this is not by common right, but by special custom." (And see *Page v. Wilson*, 2 Jac. & Walk. 523; *Erskine v. Ruffle*, Gwill. 965.)

The statute of 2 & 3 Edw. VI. c. 13, s. 5, does give an unquestionable encouragement to agriculture, by enacting that all *such* barren heath or waste grounds, not discharged from tithes, but which, before that time had lain barren and paid no tithes by reason of the same barrenness, as then were or thereafter should be improved and converted into arable or meadow ground, should from thenceforth, *after the end and term of seven years* next after such improvement, pay tithe for the corn and hay growing thereon. By the previous section, all former legal discharges from tithe were preserved: and the section next following provides, that, if the barren lands had before that time paid any tithes, the owners should, for seven years after the improvement of the ground, pay such kind of tithe as was paid for the same before the said improvement.

The criterion for determining whether land be, or be not, of such a nature as to come within the purview of this statute, is, to inquire whether it does, or does not, require extraordinary expenditure, either in manure or labour, to bring it into a proper state of cultivation. (*Warwick v. Collins*, 3 Mau. & Sel. 362; 5 Mau. & Sel. 171; *Kingsmill v. Billingsley*, 3 Pr. 472.)

If an estate be exempt from tithes, a common appendant or appurtenant thereto is entitled to the same exemption. (*Lambert v. Cumming*, Bunb. 138.) But, where an estate in one parish has a right of common appurtenant in another parish, at common law, and by general presumption, all tithes, renewing upon the common are due to the incumbent of the parish in which the common is situate: custom may, however, vary this, and assign the tithe to the incumbent of the parish in which the tenement, whereto the common is appendant, is situated. (*The Bishop of Carlisle v. Blain*, 1 Y. & J. 131.)

discharged from the payment of tithes, either in part or totally, first, by a real composition; or, secondly, by custom or prescription.

The most extensive qualification, however, of the general right of the parson of a parish to receive all the tithes accruing therein, arises whenever the parsonage is appropriate, (that is, in the hands of a spiritual corporation, see Vol. I. p. 386, n. 32,) or inappropriate, (that is, in lay hands,) and a vicarage is endowed with part of the tithes. The appointment of vicars, which had previously been matter of great scandal, was regulated by the statutes of 15 Rich. II. c. 6, and 4 Hen. IV. c. 12. These statutes direct, that every vicar shall have a competent and durable endowment, but do not further define its amount or nature: the small tithes have, in most instances, been assigned for the vicar's provision, but the usage was not invariable in this respect. The principle appears to have been, that a third of the revenues of the parsonage should be assigned to the vicar; and where the small tithes did not amount to such third share, then some part of the greater tithes were granted to make up the deficiency. Tithes of corn and hay are universally considered to be great tithes: tithe of wood is generally called a great tithe; but local usage may vary the character of this article: (*Reynolds v. Green*, 2 Bulst. 27; *S. C.* 2 Rolle's Abr. 335 :) all other predial tithes, together with all mixed and personal tithes, are ranked in the class of small tithes. (Degge, pt. 2, c. 1; Gibs. 663; Wats. c. 39.) The claims of a vicar, however, are entirely dependent upon the endowment. It is not, indeed, absolutely necessary to produce the original instrument of endowment, (*Crimes v. Smith*, 12 Rep. 4,) prescription may supply its place, if it be lost: nay more, although the original endowment is produced, and found not to contain a grant of certain

tithes, still, if the vicar has used, time out of mind, or for a long time, to take those tithes, our courts will, from the long possession, presume that the vicarage was, at some time or other, legally augmented: (*Twysse v. Brazen-Nose College*, Hardr. 329; *Kennicott v. Watson*, 2 Pr. 260, n; *Woolley v. Brownhill*, M'Clel. 331, 338; *Inman v. Whormby*, 1 Y. & J. 555 :) and wherever the vicar has enjoyed all the tithes of the class usually called small tithes, which had been theretofore produced, the fact of such enjoyment will be received as evidence that the endowment contained, in general terms, a grant of the small tithes. Whence, it will necessarily follow, he ought to receive the tithes of any new productions, or articles of modern introduction, which belong to the class falling within the description of small tithes. (*Willis v. Farrer*, 2 Y. & J. 227; *Byam v. Booth*, 2 Pr. 271.) But, in order to establish a vicar's claim to tithes not included in his endowment, the evidence of uniform perception ought to be satisfactory. (*Stokes v. Edmeades*, 1 M'Clel. & Y. 447.) And, notwithstanding the endowment of a vicarage expressly comprises the tithes of certain specified productions, still, if the uninterrupted perception and enjoyment of those tithes, by any other ecclesiastical person or corporation is proved, it will be presumed that the tithes in question were legally dissevered from the vicarage, before the restraining statutes of 13 Eliz. cc. 10 & 20 prohibited such alienation. (*Lady Dartmouth v. Roberts*, 16 East, 339; *Fanshaw v. Rotherham*, 1 Eden, 296.)

All ecclesiastical persons are capable of prescribing *in non decimando*, in respect of lands which they hold in their spiritual character; and their lessees,

1. By composition.

First, a real composition (28) is when an agreement is made between the owner of the lands, and the parson or

it seems, though laymen, may also be discharged, if a prescription comprehending them be alleged and proved, but not otherwise. (*Bishop of Lincoln v. Cooper*, Cro. Eliz. 216; *Wright v. Wright*, Cro. Eliz. 511.) Where the rector or vicar is in possession of glebe within the parish, neither of them will pay tithe to the other in respect of such occupation, (*Warden, &c. of St. Paul's v. The Dean*, 4 Pr. 77,) unless there be some special provision touching the subject in the endowment of the vicarage. (*Blinco v. Barksdale*, Cro. Eliz. 579; *Walrick v. Cropton*, Gwill. 470; *Sanders v. Ryall*, Gwill. 537.)

The reader who is disposed to go further into the doctrine of appropriations, and to investigate the origin of, and the motives inducing, the practice, may find it learnedly discussed in the report of the great case of *Grendon v. Bishop of Lincoln*, Plowd. 493—503. And there is a good popular account of it in Burn's Eccl. L., under the proper title.

It has been thought convenient thus to bring together a summary of the leading exemptions from the ordinary liability to payment of tithe to the parson of the parish, instead of dividing the subject; though such a division would have accorded with the distinct mention, in the text, of several topics alluded to in this note, some part of which (it may be proper to say) is extracted from Hovenden's Supplement to Vesey, Junr.'s Reports.

(28) As to the distinction between a composition real and a modus, see the last note. Lord Hardwicke (in the case of *The Attorney General v. Bowles*, 3 Atk. 808) said, that "real composition does not mean any substantial permanent security for the payment of the composition; but land substituted in lieu of tithes, or a rent-charge issuing out of land." Gibson,

however, (in his Cod. tit. 30, c. 5,) Watson, (Cl. L. 501,) and Degge, (pt. 2, c. 20,) agree that a composition, in consideration of money payments, may be a real composition, just as well as if the recompense to the incumbent consisted in, or arose out of, lands. They also say, that any other thing rendered or done for the ease, profit, and advantage of the parson or vicar to whom the tithes did belong may constitute a real composition. A great majority of the twelve Judges (if indeed any one was dissentient as to this point) appear to have considered this a just account of the meaning of the word, in *Knight v. Halsey* (2 Bos. & Pull. 205). It had been so held, long before, by the court of King's Bench, in the case of *Sydowne v. Holme*, (W. Jones, 369,) as well as by Mr. Justice Reynolds, in *Chapman v. Monson*, (Mosely, 286,) with whom, as appears by the report of the same case in Fitz-Gib. 120, Lord King, C., and Mr. Justice Fortescue, agreed. Such also was, apparently, the opinion of Chief Baron Eyre, in *Hawes v. Swayne*, (2 Cox, 179,) as it clearly was of Baron Wood, in the case of *Bennett v. Neale* (Wightw. 359). And that, in Lord Eldon's opinion, a money payment may be a composition real, seems a necessary inference from several passages of his Lordship's judgment, in *White v. Lisle* (3 Swanst. 346, 347, 348). Our author, as will be seen in page 30, thought every *modus* was to be referred to some real composition. The balance of authorities, therefore, seems in favour of holding, that a money payment may constitute a good composition real; and it should be recollected that the contrary *dictum* of Lord Hardwicke, above cited, though it has been adopted in many of the text books, was merely an *obiter*

vicar, with the consent of the ordinary and the patron, that such lands shall for the future be discharged from payment

dictum, and not at all the point upon which the Court had to give judgment in *The Atty.-General v. Bowles*, where the single question was, whether a devise of money to be laid out in land, or some real security, for the benefit of a charity, came within the statute of mortmain. It would be wrong, however, not to add, that it appears from the report of *Ekin v. Pigot*, (3 Atk. 298,) his Lordship's opinion on the subject was a settled one.

Sir S. Toller, (in his Treatise on Tithes, 224,) cites a case in which a composition to have a cow, and a certain number of beasts fed in a wood, in lieu of tithe of pannage, was held to be good: but he seems to have been in doubt whether this was a real composition, or some other (undefined) species of composition. In the same page, he also cites a composition for payment of five marks in lieu of tithes, which composition was established. That an endeavour to ascertain the true meaning of a composition real is not merely a paltry quibble about words, will be evident, upon referring to the judicial authorities stated in the last note, which fully establish that the evidence by which a prescriptive payment must be supported, is materially different from that necessary to sustain a real composition.

It has been thought that Lord Coke, (2 Inst. 490,) in the 12th section of his exposition of the writ of *circumspecte agatis* (13 Edw. I.) countenances the opinion that nothing can be a composition real, except it arises expressly from land. But this does not appear to the present writer a necessary conclusion, at all events, from Lord Coke's language, who classes *real compositions* amongst *decimas consuetas*, which, he says, constitute a duty personal, in satisfaction of tithes; as a *yearly sum of money*, or

other duty. He certainly adds, there is also a real *satisfaction* for tithes, when land hath been given in satisfaction of tithes out of other lands. If this language is to be taken strictly, it should rather seem, Lord Coke thought that nothing but payment of a personal duty, in pursuance of an instrument of agreement, properly constituted a *real composition*; and that where lands have been given in discharge of the tithes of other lands, this was not a composition, but a *real satisfaction*. The argument, that the effect and validity of compositions real cannot be decided by the ecclesiastical courts, proves nothing; those courts have no jurisdiction to try the validity of a mere *modus*, if it be denied. In both cases alike, the question affects the temporal inheritance, and the decision will bind the real property: it is a question, therefore, in both cases, properly triable at common law. (*Rotherham v. Fanshaw*, 3 Atk. 628; *Scott v. Wall*, Hetl. 133; *Cheesman v. Hoby*, Willes, 681; *Blacket v. Finney*, Bunb. 176; 2nd Inst. 610.)

The not very satisfactory result of this examination seems to be, that all authorities (prior to the statutes cited in the last note,) agree, no discharge from tithes could be pleaded as a *modus*, which discharge had its origin within time of legal memory, or which can be traced to an instrument of composition, otherwise than by a conjecture that such was probably the foundation of the prescription; whilst some authorities hold that nothing can be a real composition, but land, or a rent-charge issuing out of land: if this last proposition be admitted, it follows that a composition by deed, for a money-payment, or other render not issuing out of land, could neither be pleaded as a *modus*, nor as a real composition, before the late statute

[* 29]

No real composition made since 13 Eliz. good for longer time than three lives or twenty-one years.

of tithes, by reason of some land or other real recompense given to the parson, in lieu and satisfaction thereof (*m*). This was permitted by law, because it was supposed that the clergy would be no losers by such composition; since the consent of the ordinary, whose duty it is to take care of the church in general, and of the patron, whose interest it is to protect that particular church, were both made necessary to render the composition effectual: and hence have arisen all such compositions as exist at this day by force of the common law. But, experience showing that even this caution was ineffectual, and *the possessions of the church being, by this and other means, every day diminished, the disabling statute, 13 Eliz. c. 10, was made; which prevents, among other spiritual persons, all parsons and vicars from making any conveyances of the estates of their churches, other than for three lives, or twenty-one years. So that now, by virtue of this statute, no real composition made since the

(*m*) 2 Inst. 490. Regist. 38. 13 Rep. 40.

of 2 & 3 Gul. IV. c. 100. Such agreements might have been regularly entered into between all proper parties; the recompense to the parson might have been calculated advantageously for him at the time, its permanence abundantly secured, and its payment and receipt continued for centuries; yet it might have been no defence, either as a modus or a real composition, to a demand of tithes in kind. To give it effect, if it were not a money payment, it must have been referred to that hybrid class of compositions, to which Toller alludes, but to which he was at a loss to assign any generic name; and if the compensation was to be made in money, the pleader must have taken care not to call it a real composition. All these minute technicalities, however, will hereafter not claim (what they scarcely seem ever to have deserved) judicial attention; the second section of the statute of 2 & 3 Gul. IV. c. 100, so repeatedly referred to in this note, enacts, "that every composition for tithes which hath been made or confirmed by the decree of any Court of Equity

in England, in a suit to which the ordinary, patron, and incumbent were parties, and which hath not since been set aside, abandoned or departed from, shall be (and by the said act is) confirmed and made valid in law;" but it is also added, that "no modus, exemption, or discharge shall be deemed to be within the provisions of this act, unless such modus, exemption, or discharge shall be proved to have existed and been acted upon at the time of or within one year next before the passing of the act." The statute of 3 & 4 Gul. IV. c. 27, (cited in the last note,) will, at no distant period, place beyond litigation such claims to tithes, moduses, and compositions, as do not belong to eleemosynary corporations sole; and with respect to such corporations, it is to be hoped that, the tithe bill expected to be introduced in the present session of parliament, (1836,) will adjust their claims; and that the measure will be allowed to become law. It must be salutary, if it dries up this most abundant source of dissension.

13 Eliz. is good for any longer term than three lives, or twenty-one years, though made by consent of the patron and ordinary: which has indeed effectually demolished this kind of traffic; such compositions being now rarely heard of, unless by authority of parliament (29).

Secondly, a discharge by custom or prescription, is where time out of mind such persons or such lands have been, either partially or totally, discharged from the payment of tithes. And this immemorial usage is binding upon all parties; as it is in its nature an evidence of universal consent and acquiescence, and with reason supposes a real composition to have been formerly made (30). This custom, or prescription, is either *de modo decimandi*, or *de non decimando*. 2. By custom or prescription:

A *modus decimandi*, commonly called by the simple name of a *modus* only, is where there is by custom a particular manner of tithing allowed (31), different from the general Which is either *de modo decimandi*, (a particular manner of tithing allowed

(29) Though an agreement or composition, in respect of tithes, appeared clearly not to have been entered into till after the disabling statute referred to in the text, still, when such an agreement had been confirmed by decree in Chancery, it was in early times thought binding; but this notion was, in the last century, repudiated by Lord Northington, (in the case of the *Attorney General v. Cholmley*, 2 Eden, 315; *S. C.* Ambl. 510; which was affirmed, on appeal, by the House of Lords, 7 Toml. P. C. 34,) and it was determined that such compositions, though confirmed by decrees, were not binding against succeeding incumbents. (*O'Conner v. Cook*, 8 Ves. 537; *Attorney General v. Warren*, 2 Swanst. 311; *Attorney General v. Clements*, Turn. & Russ. 61.) But the old law upon the subject has been restored by a recent statute; see the last note, *ad finem*.

As to the extent to which a parson or vicar may go, with the consent of the patron and ordinary, in granting a lease of his tithes; see *post*, chap. 20, pp. 319—323, with the notes thereto.

(30) This supposition must be confined to cases of *modus decimandi*; to cases of prescription *de non decimando* it would be totally inapplicable: that our author was perfectly aware of this will appear, two pages hence, when he comes to treat of a prescription *de non decimando*.

(31) The custom may either prevail throughout a whole parish, or may be restricted to a particular farm therein. When a parochial *modus* is set up, the boundaries of the parish are presumed to be known: but where the object is to support a farm *modus*, the extent and boundaries of the farm must be set forth, and before the late stat. of 2 & 3 Gul. IV. c. 100, (as to which see the last note but one,) it must have been averred, that the farm was an ancient farm, or, at least, (what substantially amounts to the same thing,) that the *modus* had been immemorially paid for the said farm. (*Lord Stawell v. Atkins*, 2 Anstr. 565.) Accuracy in setting out the boundaries is more especially necessary in a *bill* brought to establish a farm *modus*; and notwithstanding so much exactness of

by custom,
differing from
the general law;

law of taking tithes in kind, which are the actual tenth part of the annual increase. This is sometimes a pecuniary com-

description is not necessary in an *answer*, yet it must give some description of the particular lands, in respect of which the defendant claims to be covered by the *modus*: if a farm *modus* be so loosely pleaded as not to point to some definite estate, an account of tithes must be decreed. (*Gillibrand v. Scotson*, 4 Pr. 272; *Scott v. Allgood*, 1 Anstr. 21; *Norton v. Hammond*, 1 Younge & Jerv. 111.)

A *modus* may be good for all or some particular ancient gardens or orchards within a parish; and in pleading such a *modus* it was not necessary, even before the late statute, to aver, in express words, that the gardens or orchards were ancient, if it was alleged that a *modus* had been immemorially paid in respect thereof. (*Blackburn v. Jepson*, 17 Ves. 476; *Prevost v. Benett*, 2 Pr. 276.) And it seems, the boundaries of ancient gardens and orchards need not be set out; for, in regard to these, the denomination is a sufficient description. (*Scott v. Allgood*, 1 Anstr. 21.) As the extent of the land alleged to be covered by a farm *modus* is just as likely to be a disputed point now as it was before the passing of the late statute, the particular rules of evidence with regard to this subject are as necessary to be studied as ever they were. A farm *modus* for part of a farm may be valid, if the part covered by the *modus* be clearly distinguished; but in this and indeed in every case of farm *modus*, though courts of equity always maintained a right to decide thereon, without a trial at law, a long course of decision established it as a matter of sound judicial discretion before the late act, and it can hardly be deemed less discreet now, to send the question of a *farm* *modus* to a jury; that, it has been said, was the constant course. (*White v. Lisle*, 3 Swanst. 344; and

see *ante*, note (26.) But perhaps an exception to the universality of this rule was, and is, proper to be made, whenever the right depends upon the construction of ancient documents. Where witnesses can be personally examined, and it is possible that such examination may throw light upon the subject, there it would be an objectionable exercise of power, to refuse an issue: but where all the testimony of any real weight, which could be submitted to a jury must be submitted to them upon paper; and more especially where such evidence consists of instruments, (written, possibly, in old law Latin or French,) a court is more likely to put an accurate construction upon such instruments than a jury, and it is more properly within the province of the court to do so. In such cases, therefore, it would be only putting the parties to further and unnecessary expense, if an issue were directed. (*Donnison v. Elsley*, 1 M'Clel. & Yo. 26; *Fisher v. Lord Graves*, Ibid. 379; *Jackson v. Morris*, 1 Younge & Jervis, 284.) In support of farm *moduses*, reputation is a species of evidence which, it has been often said, courts of equity are precluded from receiving, on the ground that reputation, though admissible where all the occupiers of a whole parish are concerned, is not evidence in a question of private right. (*Pritchett v. Honeybourne*, 1 Y. & J. 145; *Donnison v. Elsley*, 1 M'Clel. & Y. 24; *White v. Lisle*, 4 Mad. 223.) However, when the last cited case was before Lord Eldon, (3 Swanst. 348,) he intimated, that it might be material to know the particular nature of the evidence, before deciding whether evidence of reputation ought or ought not to be received concerning a farm *modus*: for instance, his Lordship thought, in order to prove the boun-

pensation, as twopence an acre for the tithe of land: sometimes it is a compensation in work and labour, as, that the parson shall have only the twelfth cock of hay, and not the tenth, in consideration of the owner's making it for him (32): sometimes, in lieu of a large quantity of crude or imperfect tithe, the parson shall have a less quantity, when arrived to greater maturity, as a couple of fowls in lieu of tithe eggs; and the like. Any means, in short, whereby the general law of tithing is altered, and a new method of taking them is introduced, is called a *modus decimandi*, or special manner of tithing.

*To make good and sufficient *modus*, the following rules [* 30] must be observed. 1. It must be *certain* and *invariable* (n) (33), for payment of different sums will prove it to be good, must be certain and invariable,

(n) 1 Keb. 602.

daries of a farm, surrounded by a common, and alleged to be covered by a farm *modus*, it would be admissible to prove, by reputation, the boundaries of the common, coinciding with the boundaries of the farm, and by such means to prove, by approximation, the boundaries of the farm. It is obvious this would not at all break in upon the spirit of the rule, that reputation is not evidence in a question of private right. Evidence respecting the boundaries of a common, is, *ex vi termini*, necessarily evidence of a fact in which numbers have an interest. (See Phillips on Evid. ch. 7, s. 7.) Although the metes and boundaries of lands, in respect of which a district *modus* is set up, are not specified in the body of the pleadings, yet if these refer to a map of the lands, *that*, when the correctness of the map is proved, will be held sufficient. (*Jenkinson v. Royston*, 5 Pr. 504, 506; *Clarke v. Jennings*, 4 Gwill. 1424.)

(32) This must be borne in mind, as qualifying what our author states in the next page, namely, that "a *modus* must be something *different* from the thing compounded for." By combining the two propositions we shall ar-

rive at the true rule, (as it stood before the last act of 2 & 3 Gul. IV. c. 100, and as it still subsists, of course, in all cases not within the operation of that act,) which rule is, that no custom to pay part of the thing of which the tithe consists, can be good in discharge of the full tithe, unless a part is paid in a more beneficial manner than the law prescribes. (*Hide v. Ellis*, Hetl. 133; *S. C.* Hob. 250; *Hill v. Vaux*, 1 Ld. Raym. 359; *S. C.* 2 Salk. 656. And see *ante*, the note to p. 24.)

(33) When the rule of law is stated to be, that a *modus* ought to be as certain as the tithes in lieu of which it comes, the meaning of this, (even when the circumstances of the case at the time under consideration do not bring it within the scope of the act of 2 & 3 Gul. IV. c. 100,) is to be understood according to a common reasonable intent, but not to be weighed by grains and scruples. (*Hardcastle v. Smithson*, 3 Atk. 246.) In the case just cited, Lord Hardwicke referred to that of *Cowper v. Andrewes*, (Hob. 40,) where a *modus*, (for though in the report it is sometimes called a composition, it was a claim resting on prescrip-

beneficial to the
parson,

be no *modus*, that is, no original real (34) composition ; because that must have been one and the same, from its first original to the present time. 2. The thing given in lieu of tithes, must be beneficial to the *parson*, and not for the emolument of *third persons* only (*o*) : thus a *modus*, to repair the *church* in lieu of tithes, is not good, because that is an advantage to the parish only ; but to repair the *chancel* is a good *modus*, for that is an advantage to the parson.

(*o*) 1 Roll. Abr. 649.

tion only,) in recompense of tithe, consisting of two parts ; one (a money payment) certain ; the other, a render uncertain, casual, and entirely depending upon the will of the owner of the land ; (who in fact did, by his own acts, deprive the parson of this part of the recompense,) was said to be good ; and where other analogous cases are mentioned. It should be observed, that in *Poole v. Reynold*, (Hutt. 58,) it is observed, that the case of *Cowper v. Andrewes*, never received final judgment upon the point in question : the opinion of the Chief Justice, however, seems to have been quite clear, as was that of Nichols, J., though it appears from the report in Moor, 863, that Winch and Warburton, Js., doubted. And see *Bedingfield v. Feake*, Moor, 909. But, assuredly, a *modus*, unless the case is brought within the operation of the late act, cannot be supported, which is so uncertain as to leave it in doubt whether the parson shall receive any recompense at all : (*Carlton v. Brightwell*, P. Wms. 462 ; *Perry v. Soam*, Cro. Eliz. 139 :) though it is not necessary the *modus* should be the same every year ; (*Chapman v. Monson*, 2 P. Wms. 572, citing *Brown's case*, Godb. 194 ;) and where the variation arises from any encroachment by the parson in certain years, or through ignorance of the tenant, this will not affect a custom previously well established : (*Fleming v. The Tenants of Dudley*, Saville, 13 ; *Cowper v.*

Andrewes, Hob. 42 :) therefore, although a *modus decimandi* has not been yielded for twenty years, the prescription is not necessarily gone : (*Nowell v. Hicks*, 2 Inst. 653 :) and as to variations of payment arising out of different systems of cultivating the land, these will never affect the subsistence of the *modus*. (*Cart v. Hodgkin*, 3 Swanst. 164, n. ; *Brown's case*, Godb. 194 ; *The Parson of Peykirke's case*, Dyer, 349 b, the particulars of which, relating to the point now in discussion, are more distinctly stated in Hob. 44.) Perhaps, the true rule, in cases not within the provisoes of the late statute, may be, not that a *modus* must be certainly payable in all events, but that, although its payments or non-payments may depend upon specified contingencies, still, when those contingencies do arise, the amount of the *modus*, under the actual circumstances, may be clearly ascertained. (*Chapman v. Monson*, Mosely, 286.) Such a case is plainly distinguishable from that in which it was resolved, that a prescription to pay a *modus* of one penny, or *thereabouts*, in lieu of tithes of each acre of land, was bad. (2 Rolle's Abr. 265.)

(34) As many, perhaps most *moduses*, consist of pecuniary recompenses, our author is clearly to be added to the number of authorities who hold, that a render not arising out of lands may be a real composition. See *ante*, the note to p. 28.

3. It must be something *different* (35) from the thing compounded for (*p*): one load of hay, in lieu of *all* tithe hay, is no good *modus*; for no parson would *bonâ fide* make a composition to receive less than his due in the same species of tithe: and therefore the law will not suppose it possible for such composition to have existed. 4. One cannot be discharged from payment of one species of tithe, by paying a *modus* for another (*q*). Thus a *modus* of 1*d.* for every *milch* cow will discharge the tithe of *milch* kine, but not of *barren* cattle: for tithe is, of common right, due for both; and therefore a *modus* for one shall never be a discharge for the other. 5. The recompense must be in its nature as durable (36) as the tithes discharged by it; that is, an inheritance certain (*r*): and therefore a *modus* that every *inhabitant* of a house shall pay 4*d.* a-year, in lieu of the owner's tithes, is no good *modus* (37): for possibly the house

something different from the thing compounded for,

for certain definite things,

as durable as the tithes discharged by it,

(*p*) 1 Lev. 179.

(*q*) Cro. Eliz. 446; Salk. 657.

(*r*) 2 P. Wms. 462.

(35) See the last page, and note (32) thereto. Long before the act so often cited in the notes to this chapter, a *modus* for payment of thirty eggs once a-year to the parson, in lieu of all tithes of eggs, was established. (*Lee v. Collins*, 1 Rolle's Abr. 648.) So, a *modus* to pay three eggs for every cock and hen, drake and duck, in lieu of tithe eggs, and chickens and ducklings, was held good. (*Brinklow v. Edmonds*, Bunb. 308.) These decisions were accounted for upon a very intelligible principle, namely, that the parson was sure of his *modus*, whether there were any eggs laid, or poultry hatched, in the parish, or not. (*Hill v. Vaux*, Salk. 656.) Would not the same reasoning justly apply to the *modus* stated in the text above, of "one load of hay, in lieu of all tithe hay?" The parson would be sure of his *modus*, whether any hay were made or not. Since the passing of the statute of 2 & 3 Gul. IV. c. 100, no question can be raised as to the clear validity of any *modus*, if it can be shown that the facts of the

case under consideration bring it within the scope of the act: but, it must be admitted, the act does not, in terms, contradict the rule by Blackstone, though the intent of the legislature plainly was to get rid of technical objections to claims of *modus*.

(36) That, although the recompense in lieu of tithes must be durable, it is not necessary it should take place every year, or be invariably the same when it does take place, see note (33) to this page.

(37) It is not to be understood that a *modus* is necessarily bad, because its payment depends upon the fact of residence, or non-residence. In a parish, where every resident occupier of pasture land was liable to tithes in kind, a *modus* that if any occupier of land lived out of the parish, he should pay four-pence an acre for all pasture land within the parish, has been repeatedly held to be good. (*Chapman v. Monson*, 2 P. Wms. 575; *S. C.* Mosely, 286, and 1 Eq. Ca. Abr. 368.)

and not too
large ;

[* 31]

may not be inhabited, and then the recompense will be lost. 6. The *modus* must not be too large, which is called a *rank modus* (38): as if the real value of the tithes be 60*l. per annum*, and a *modus* is suggested of 40*l.*, this *modus* will not be established; though one of 40*s.* might have been valid (*s*). Indeed, properly speaking, the doctrine of *rankness* in a *modus*, is a mere rule of evidence, drawn from the improbability of the fact, and not a rule of law (*t*). For, in these cases of prescriptive or customary *moduses*, it is supposed that an original real (39) composition was anciently made; which being lost by length of time, the immemorial usage is admitted as evidence to show that it once did exist, and that from thence * such usage was derived. Now time of memory hath been long ago ascertained by the law to commence from the beginning of the reign of Richard the first (*u*); and any custom may be destroyed by evidence of its non-existence in any part of the long period from that time to the present (40); wherefore, as this real composition is supposed to have been an equitable contract, or the full value of the tithes, at the time of making it, if the *modus* set up is so rank and large, as that it beyond dispute exceeds the value of the tithes in the time of Richard the first, this *modus* is (in point of evidence) *felo de se*, and destroys itself. For, as it would be destroyed by any direct evidence to prove its non-existence at any time since that æra, so also it is destroyed by carrying in itself this internal evidence of a much later original (41).

(*s*) 11 Mod. 60.

(*t*) *Pyke v. Dowling*, Hil. 19 Geo. III. C. B.

(*u*) 2 Inst. 238, 239. This rule was adopted, when, by the statute of Westm. 1, (3 Edw. I. c. 39,) the reign of Richard I. was made the time of limitation in a writ of right. But, since by the statute 32 Hen. VIII. c.

2, this period (in a writ of right) hath been very rationally reduced to sixty years, it seems *unaccountable that the date of legal prescription or memory should still continue to be reckoned from an æra so very antiquated*. See Litt. s. 170; 34 Hen. VI. 37; 2 Roll. Abr. 269, pl. 16.

(38) See *ante*, the notes to pp. 28 & 29.

(39) See *ante*, the last note to p. 28.

(40) But the time of prescription has lately been much shortened by the

statutes of 2 & 3 Gul. IV. c. 100, and 3 & 4 Gul. IV. c. 27.

(41) It is obvious, that a *modus*, which, before the stat. of 2 & 3 Gul. IV. c. 100, must have had its commencement before time of legal me-

A prescription *de non decimando* (42) is a claim to be entirely discharged of tithes, and to pay no compensation in lieu of them. Thus the king by his prerogative is discharged from all tithes (*v*). So a vicar shall pay no tithes to the rector, nor the rector to the vicar, for *ecclesia decimas non solvit ecclesiæ* (*w*) (43). But these *personal* privileges (not arising from or being annexed to the land) are personally confined to both the king and the clergy: for their tenant or lessee shall pay tithes (44), though in their

Or, *de non decimando*—a claim to be entirely discharged of tithes, and to pay no compensation in lieu of them.

Who are personally discharged from tithes.

(*v*) Cro. Eliz. 511.

(*w*) Cro. Eliz. 479, 511; Sav. 3; Moor, 910.

mory, carries with it internal evidence of a later origin, if it profess to cover the tithe of articles specified by name in the alleged modus, but which were unknown, or not cultivated, or bred, in this country in the year 1189. But, though the application of the old law upon the subject was plain enough, it was held proper, whenever there was any sort of doubt as to the matter of fact, to refer that question to a jury. (*Davies v. Mosely*, M'Clel. 145; *Bertie v. Beaumont*, 2 Pr. 312.) Since the passing of the statute cited, this point, it may be hoped, is finally set at rest.

(42) See *ante*, the third note to p. 28.

(43) This maxim, it was said by Richards, C. B., merely applies to the case of a rector and vicar of the same church and parish, where the *ecclesia* would be paying tithes to *itself*. In no other case, it was added, can an ecclesiastical person rest his exemption upon this maxim, but must prescribe *de non decimando*. (*Warden and Minor Canons of St. Paul's v. The Dean*, 4 Pr. 77, 78.)

(44) Our author, with proper caution, restricts this to cases in which the privilege of exemption is *personal*; and in such cases it is very like an identical proposition to say, that it does not extend to other than the persons privileged. But the privileges

of the king, or of a bishop, or ecclesiastical corporation, to prescribe *de non decimando*, are not necessarily so confined. To be sure, if the king absolutely aliens lands, which, whilst they were royal demesnes, were, as such, discharged of tithes, the prescription may be totally destroyed, so as not to revive, although the lands return into the king's hands again. (*Compost v. —*, Hardr. 315; *S. C. Gwill. 514*; *Lord Hertford v. Leech*, W. Jones, 387.) So if a bishop, or ecclesiastical corporation, make a feoffment, or grant in fee, of lands which, in their hands, were exonerated from tithes, on account of their spiritual character; their feoffees, or grantees, can lay no claim to the same exemption: (*Sydown v. Holme*, W. Jones, 368; *Vicar of Sturton v. Gresley*, Saville, 3 :) though it seems, (contrary to the rule which we have seen laid down respecting the privilege of the crown in a similar case,) should the bishop regain possession of the lands, his prescription will be revived. (*Bishop of Lincoln v. Cooper*, Cro. Eliz. 216.) It has been thought possible, however, that the apparent anomaly which this case presents may be accounted for, on the ground that the bishop's alienation was thought to have been a compulsory one, enforced by the power of the Duke of Somerset, whilst he was all but absolute,

Spiritual persons
or corporations,
how discharged
of tithes.

[* 32]

own occupation their lands are not generally titheable (*w*). And, generally speaking, it is an established rule, that, in *lay* hands, *modus* (45) *de non decimando non valet* (*x*). But spiritual persons or corporations, as monasteries, abbots, bishops, and the like, were always capable of having their lands totally discharged of tithes by various ways (*y*) (46): as, 1. By real composition: 2. By the pope's bull of exemption: 3. By unity of possession; as when the rectory of a parish, and lands in the same parish, both belonged to a religious *house, those lands were discharged of tithes by this unity of possession: 4. By prescription; having never been liable to tithes, by being always in spiritual hands: 5. By virtue of their order; as the knights templars, cistercians, and others, whose lands were privileged by the pope with a discharge of tithes (*z*). Though upon the dissolution

(*w*) Cro. Eliz. 479.

(*x*) Ibid. 511.

(*y*) Hob. 309; Cro. Jac. 308.

(*z*) 2 Rep. 44; Seld. Tith. c. 13, s. 2.

during the minority of Edw. VI., and that, notwithstanding this usurpation, the right to the lands remained all along vested in the bishop. (*Page v. Wilson*, 2 Jac. & Walk. 530.) But the king is capable of prescribing *de non decimando* for himself and his farmers; although crown lands are not exempt from tithes, merely as belonging to the crown, without an express prescription alleged and proved. (*Countess of Lennox's case*, 2 Leon. 71; *Fosset v. Franklin*, 3 Keb. 217; *Ingoldsby v. Wivell*, Hardr. 382; *Dickenson v. Greenhow*, Poph. 158.) And not only the annual farming tenants of a bishop, (*Bishop of Winchester's case*, 2 Rep. 45,) but the copyhold tenants of his manor, notwithstanding they may have estates of inheritance, or even in fee, in such copyholds, may have the lands so holden exempted from tithes, by virtue of the bishop's prescription, in whom the freehold of such lands remains. (*Wright v. Wright*, Cro. Eliz. 511; *Crouch v. Fryer*, Cro. Eliz. 785; *S. C. Yelv.* 3; *Hughes v. Keene*, Godb. 183; *Ste-*

phenson v. Hill, 3 Burr. 1278.) Of course, these last resolutions apply equally to the tenants of any other person, or corporation, capable of prescribing *de non decimando*, as to the tenants of a bishop. And it seems to admit as little doubt, that where the land itself is exempt, it is discharged in whatever hands it may happen to be. (*Benning v. Dowce*, Bunb. 26.)

(45) It is not very accurate to speak of a *modus de non decimando*; a *modus*, as our author has taught us, is a particular manner of tithing; where the privilege asserted is that of not paying tithes at all, *præscriptio* is the more proper word, as the commencement of the paragraph shows Blackstone to have been well aware; (and see *post*, p. 263). It would be idle to notice so trivial an oversight, if some of the books of practice had not copied it: by which a non-professional reader might be misled into supposing, that *modus* and *prescription* are, in all cases, convertible terms.

(46) See *ante*, the third note to p. 28.

of abbeys by Henry VIII., most of these exemptions from tithes would have fallen with them, and the lands become titheable again; had they not been supported and upheld by the statute 31 Hen. VIII. c. 13, which enacts, that all persons who should come to the possession of the lands of any abbey then dissolved, should hold them free and discharged of tithes, in as large and ample a manner as the abbeys themselves formerly held them (47). And from this original have sprung all the lands, which, being in lay hands, do at present claim to be tithe-free: for, if a man can show his lands to have been such abbey-lands, and also immemorially discharged of tithes by any of the means before mentioned, this is now a good prescription *de non decimando*. But he must show both these requisites (48); for abbey-lands, without a special ground of discharge, are not discharged of course; neither will any prescription *de non decimando* avail in total discharge of tithes, unless it relates to such abbey-lands.

Lands, in lay hands, formerly belonging to abbeys, discharged of tithes.

III. Common, or right of common, appears from its very definition to be an incorporeal hereditament: being a profit which a man hath in the land of another; as to feed his beasts, to catch fish, to dig turf, to cut wood, or the like (a). And hence common is chiefly of four sorts: common of pasture, of piscary, of turbary, and of estovers.

III. Common,

is of four sorts:

1. Common of pasture is a right of feeding one's beasts on another's land: for in those waste grounds, which are usually called commons, the property of the soil is generally in the lord of the manor; as in common fields it is in the

1. Common of pasture—which is either

(a) Finch, Law, 157.

(47) This provision extends not only to such possessions as vested in the king by force of the said act, but also to possessions which vested in him by the subsequent act of 32 Hen. VIII. c. 24. (*Whitton v. Weston*, T. Jones, 187; *Star v. Ellyot*, Freem. K. B. R. 299; *Fosset v. Francklin*, T. Raym. 225.) But, with respect to such lands of the lesser abbeys as were only exempt from tithes *ratione ordinis*, and as long as *propriis manibus*

excolebantur, and which abbeys were dissolved by stat. 27 Hen. VIII. c. 28, it has been resolved, that the act of 31 Hen. VIII. has not the retrospective effect of discharging them. (*Gerrard v. Wright*, Cro. Jac. 607; *S. C.* Hob. 309; *Sydown v. Holme*, Cro. Car. 424.)

(48) See *ante*, the third note to p. 28, for some qualification of this doctrine.

particular tenants. This kind of common is either appendant, appurtenant, because of vicinage, or in gross (*b*).

appendant,
[* 33]

* Common *appendant* is a right belonging to the owners or occupiers of arable land (49), to put commonable beasts upon the lord's waste, and upon the lands of other persons within the same manor. Commonable beasts are either beasts of the plough, or such as manure the ground (50). This is a matter of most universal right: and it was originally permitted (*c*), not only for the encouragement of agriculture, but for the necessity of the thing. For, when lords of manors granted out parcels of land to tenants, for services either done or to be done, these tenants could not plough or manure the land without beasts; these beasts could not be sustained without pasture: and pasture could not be had but in the lords' wastes, and on the uninclosed fallow grounds of themselves and the other tenants. The law therefore annexed this right of common, as inseparably incident to the grant of the lands; and this was the original of common appendant: which obtains in Sweden, and the other northern kingdoms, much in the same manner as in England (*d*). Common *appurtenant* ariseth from no connexion of tenure, nor from any absolute necessity: but may be annexed to lands in other lordships (*e*), or extend to other beasts, besides such as are generally commonable; as hogs, goats, or the like, which neither plough

appurtenant,

(*b*) Co. Litt. 122.

(*c*) 2 Inst. 86.

(*d*) Stiernh. de jure Sueonum, l. 2,

c. 6.

(*e*) Cro. Car. 482; 1 Jon. 397.

(49) See *ante*, the second note to p. 19, that common of pasture may be appendant to a messuage or cottage. And see also *post*, note to p. 34. The enjoyment of right of common of pasture has received some beneficial regulations, by stat. 13 Geo. III. c. 81, ss. 17—21; and by the statute of 2 & 3 Gul. IV. c. 71, it is enacted, that claims to right of common shall be absolute and indefeasible after sixty years' enjoyment.

(50) Common of pasture appendant may, by usage, be limited to any certain number of cattle; but where there is no such usage, it is restrained

to cattle *levant* and *couchant* upon the land to which the right of common is appendant; and the number of cattle to be so considered and allowed, shall be ascertained by the number of cattle which the land is equal to maintain during the winter. A claim of right of common, without any limitation, is not recognized by our courts of law. (*How v. Strode*, 2 Wils. 274; *Benson v. Chester*, 8 T. R. 398, 400; *Cheesman v. Hardham*, 1 Barn. & Ald. 711; *Bennett v. Reeve*, Willis, 231; *Patrick v. Lowre*, 2 Brownl. 101. And see *post*, notes (51) and (53).

nor manure the ground. *This* not arising from any natural propriety or necessity, like common appendant, is therefore *not of general right*; but can only be claimed by immemorial usage and prescription (*f*) (51), which the law esteems sufficient proof of a special grant or agreement for this purpose. Common *because of vicinage*, or neighbourhood, is ^{because of vicinage,} where the inhabitants of two townships, which lie contiguous to each other, have usually intercommoned with one another; the beasts of the one straying mutually into the other's fields, without any molestation from either (52). This is indeed only a permissive right, intended to excuse what in strictness is a trespass in both, and to prevent a multiplicity of suits: and therefore either township may inclose and bar out the other, though they have intercommon-

(*f*) Co. Litt. 121, 122.

(51) Or by special grant, which might be good, even before the late act, though made within time of legal memory. (*Cowlam v. Slack*, 15 East, 115, 116; *Sacheverill v. Porter*, W. Jones, 397; see the last note but one as to the present law.) When a man prescribes for common for a certain number of cattle, as a right appurtenant, it is not necessary to show that they were *levant* and *couchant*, for the number being ascertained, no encroachment is possible. (*Richards v. Squibb*, 1 Ld. Raym. 726.) But, a man who claims common appurtenant, not for a specified number of cattle, ought to plead that it is for cattle *levant* and *couchant*; for, if he puts in others he does a wrong, and may be punished as a trespasser. (*Hoskins v. Robins*, 2 Saund. 326 a.) Common, whether appendant or appurtenant, for beasts *levant* and *couchant*, cannot be granted over; but common appurtenant, for a limited number of beasts, may be granted over. (*Spooner v. Day*, Cro. Car. 433; *S. C. W. Jones*, 375; *Drury v. Kent*, Cro. Jac. 14. *Bunn v. Channen*, 5 Taunt. 244.)

Mr. Wooddeson (in his 21st Vin. Lect.) says, "common appurtenant, like that in gross, may be either by

prescription, or express grant, and consequently *may* begin within time of legal memory; which is not the case of common appendant; for that cannot begin at this day, but is of common right." Mr. Wooddeson is fully borne out by the authority of the cases of *Sacheverill v. Porter*, Cro. Car. 482; *Wyatt Wyld's case*, 8 Rep. 157; *Tyringham's case*, 4 Rep. 38; and *Gawen v. Stacie*, 1 Rolle's Ab. 400. The passage in our author's text required some qualification, even before the late enactments.

(52) Common because of vicinage can only be used by cattle *levant* and *couchant* upon the lands to which such permissive right of common is annexed. (*Sir Miles Corbett's case*, 7 Rep. 66.) Common for cause of vicinage is not common appendant; but, inasmuch as it ought to be by immemorial prescription, it is in this respect resembled to common appendant. (*Tyringham's case*, 4 Rep. 38.) It seems, that common because of vicinage can only subsist between two immediately adjoining townships; and not where they are separated, however slightly, by any intermediate land. (*Bromfield v. Kirber*, 11 Mod. 72.)

[* 34]

or, *in gross*;

and either limited or without stint.

Lord of a manor may inclose waste for tillage, provided he leave sufficient common for those entitled.

ed time out of mind. Neither hath any person of one town a right to put his beasts originally *into the other's common: but if they escape, and stray thither of themselves, the law winks at the tresspass (*g*). Common *in gross*, or at large, is such as is neither appendant nor appurtenant to land, but is annexed to a man's person; being granted to him and his heirs by deed; or it may be claimed by prescriptive right, as by a parson of a church, or the like corporation sole. This is a separate inheritance, entirely distinct from any landed property, and may be vested in one who has not a foot of ground in the manor.

All these species of pasturable common may be, and usually are, limited as to number and time; but there are also commons without stint (53), and which last all the year. By the statute of Merton, however, and other subsequent statutes (*h*), the lord of a manor may inclose so much of the waste as he pleases, for tillage or wood ground, provided he leaves common sufficient for such as are entitled thereto. This inclosure, when justifiable, is called in law, "approving:" an ancient expression signifying the same as "improving" (*i*). The lord hath the sole interest in the soil; but the interest of the lord and commoner in the common, are looked upon in law as mutual. They may both bring actions for damage done, either against strangers, or each other (54); the lord for the public injury, and each commoner for his private damage (*k*) (55).

(*g*) Co. Litt. 122.(*i*) 2 Inst. 474.(*h*) 20 Hen. III. c. 4; 29 Geo. II. c. 36., and 31 Geo. II. c. 41.(*k*) 9 Rep. 113; [15 East, 161.]

(53) The man who prescribes for common without stint, must also aver that the cattle are fed on his own land, or are *levant* and *couchant* there; for, common *sans nombre* is only for beasts *levant* and *couchant*, so that even this is a common certain. (1 Inst. 122 a. 2 Inst. 85. *Chicheley* v. —, Hardr. 118. *Mellor* v. *Spateman*, 1 Saund. 344; and see, *ante*, note (50); as also Vol. III. pp. 238, 239.)

(54) The leading authorities in support of this doctrine are collected in note (2) to *Mellor* v. *Spateman*, (1

Saund. 346,) where the technicalities necessary to be attended to in the pleadings, when an action is brought for such damage, are set forth. See also the conclusion of note (2) to *Potter* v. *North* (Ibid. 353, which case is also reported, and in some respects more fully, in 1 Vent. 383—398; and, as to the first action, tried in the Court of Common Pleas, in Vaugh. 251—258).

(55) See Vol. III. p. 237, and the note thereto.

2. 3. Common of *piscary* (56) is a liberty of fishing in another man's water: as common of *turbary* is a liberty of digging turf upon another's ground (l) (57). There is also

2. 3. Common
of piscary and
turbary.

(l) Co. Litt. 122.

(56) Mr. Wooddeson, (in his 21st Vin. Lect. s. 5,) doubts the propriety of including a piscary of any sort under rights of common, as one species or class thereof: he seems to think that all fisheries, of whatever description, ought rather to be referred to the head of franchises. Our author's reasons for pursuing a different course, will be found in the 7th section of this chapter; if he has erred at all, it is not in supposing that common of piscary may exist upon the same footing as other rights of common, but in making a distinction between common of fishery, and free fishery: as to which, see *post*, the note to p. 39.

(57) Common of turbary can only be appendant, or appurtenant, to a house, not to lands: (*Tyringham's case*, 4 Rep. 37:) and the turf cut for fuel must be burned in the commoner's house; (*Dean and Chapter of Ely v. Warren*, 3 Atk. 189;) not sold. (*Valentine v. Penny*, Noy, 145; *Lord Courtown v. Ward*, 1 Sch. & Lef. 8.) So, it seems, an alleged custom for the tenants of a manor to be entitled to cut and carry away from the wastes therein an indefinite quantity of turf, covered with grass, fit for the pasture of cattle, for the purpose of making and repairing grass plots in their gardens, or other improvements and repairs of their customary tenements, cannot be supported. (*Wilson v. Willes*, 7 East, 127.)

The statute of Merton (20 Hen. III. c. 4, concerning approvments of commons,) does not extend to either commons of turbary, of piscary, of estovers, or the like. (2 Inst. 87; *Fawcett v. Strickland*, Comyn, 579.) But,

where there is common of pasture and common of turbary in the same waste, the common of turbary will not hinder the lord from inclosing against the common of pasture, for they are two distinct rights; and the question will not be altered, though these two rights may happen to concur in one and the same person. If it were otherwise, the objection to approvment would be just the same, where common of piscary or common of estovers came in question. Yet it would be absurd to say, a lord cannot inclose against common of pasture, because his tenants, or some other persons, have common of piscary, or common of estovers in the same waste. If, indeed, their enjoyment of either of these rights was affected by such inclosure, they might certainly maintain an action; and so may a commoner whose enjoyment of a common of turbary is interrupted. (*Fawcett v. Strickland*, Willes, 60.) Some authorities seem to intimate, that, as a general rule, the owner of the soil in which there is a right of common of turbary, cannot approve. Such a rule, however, is at all events not universal; and the power of approvment may reasonably exist, without derogation from the fair enjoyment of the rights of common. Common of turbary must be enjoyed in respect of ancient messuages. Many of those ancient messuages may be destroyed, and others not substituted, and it would be unreasonable that the whole of a waste should remain uninclosed, so long as a single commoner in respect of an ancient messuage should have a right to cut turf upon the common. The question, whether a sufficiency of common of turbary, or

a common of digging for coals, minerals, stones, and the like. All these bear a resemblance to common of pasture in many respects ; though in one point they go much farther ; common of pasture being only a right of feeding on the herbage and vesture of the soil, which renews annually ; but common of turbary, and those aforementioned, are a right of carrying away the very soil itself.

4. Common of estovers.

[* 35]

*4. Common of estovers (58) or *estouviers*, that is, *necessaries*, (from *estoffer*, to furnish,) is a liberty of taking necessary wood, for the use or furniture of a house or farm, from off another's estate. The Saxon word, *bote*, is used

of pasture, is left for the commoners, is a question to be left to the decision of a jury. (*Arlett v. Ellis*, 7 Barn. & Cress. 371.) The extent to which either the lord of a manor, or the commoners, may exercise their respective privileges above mentioned, may frequently, indeed commonly, depend upon custom. (*Bateson v. Green*, 5 T. R. 416, and cases in the notes thereto. See Vol. III. p. 240.)

(58) The liberty which every tenant for life, or years, has, of common right, to take necessary estovers *in the lands which he holds* for such estate, seems to be confounded, in most of the text books, with right of common of estovers. Yet they appear to be essentially different (and see Vol. III. p. 224). The privilege of the tenant for life or years is an exclusive privilege, not a commonable right. Right of common of estovers seems properly to mean, a right appendant or appurtenant to a messuage or tenement, to be exercised in lands *not* occupied by the holder of the tenement. Such a right may either be prescriptive, or it may arise from modern grant. (*Countess of Arundel v. Steere*, Cro. Jac. 25.) And though the grant be made to an individual, for the repairs of his house, the right is not a personal one, but appurtenant to the house. (*Dean and Chapter of Windsor's case*, 5 Rep. 25 ; *Sir Henry Nevill's case*, Plowd. 381.) Such a grant is not destroyed

by any alteration of the house to which the estovers are appurtenant, but it may be restricted within the limits originally intended, if the altered state of the premises would create a consumption of estovers greater than that contemplated when the grant was made. (*Luttrell's case*, 4 Rep. 87.)

If estovers of wood be granted, to be taken in a certain wood, the owner of which cuts down some of the wood, the grantee cannot take the wood so cut : even if the whole be cut down, he has no remedy but an action of covenant or on the case : (*Basset v. Maynard*, Cro. Eliz. 820 ; *Pomfret v. Ricraft*, 1 Saund. 322 ; *Dowglass v. Kendal*, Cro. Jac. 256 ; *S. C. Yelv.* 187 : which last cited case illustrates the distinction between an *exclusive* right to the wood growing on certain land, and a right of *common* of estovers only.) It is true, that a single copyholder, or other tenant, and that one only, may be entitled to right of common of pasture, or estovers, or other profit in the land of the lord of the manor ; but then, the lord at least must participate in the right ; if the tenant enjoyed the right solely, severally, and exclusively, it would be difficult, without a violent strain of language, to discover in such a right any commonable qualities. (*Foiston and Cracherode's case*, 4 Rep. 32 ; *North v. Coe*, Vaugh. 256.)

by us as synonymous to the French *estovers*: and therefore, house-bote is a sufficient allowance of wood, to repair, or to burn in, the house; which latter is sometimes called fire-bote; plough-bote and cart-bote are wood to be employed in making and repairing all instruments of husbandry: and hay-bote, or hedge-bote, is wood for repairing of hays, hedges, or fences. These botes or estovers must be reasonable ones; and such any tenant or lessee may take off the land let or demised to him, without waiting for any leave, assignment, or appointment of the lessor, unless he be restrained by special covenant to the contrary (*m*).

These several species of commons do all originally result from the same necessity as common of pasture; *viz.* for the maintenance and carrying on of husbandry; common of piscary being given for the sustenance of the tenant's family; common of turbary and fire-bote for his fuel; and house-bote, plough-bote, cart-bote, and hedge-bote, for repairing his house, his instruments of tillage, and the necessary fences of his grounds.

IV. A fourth species of incorporeal hereditaments is that of *ways* (59); or the right of going over another man's ground (60). I speak not here of the king's highways, which lead from town to town; nor yet of common ways, leading from a village into the fields (61); but of private ways, in which a particular man may have an interest and a right, though another be owner of the soil (62). This may be grounded on a special permission; as when the owner of the land grants to another the liberty of passing over his grounds, to go to

IV. Ways.
Which are
founded on
grant,

(*m*) Co. Litt. 41.

(59) See *post*, 396, n. Vol. III. pp. 218, 241.

(60) A right of way over another man's ground, being an incorporeal hereditament, collateral to land, cannot be divested; the interest will not cease to exist, *potentialiter*, merely by non-user for a time. In this respect it resembles a right of common of pasture, a rent, or other incorporeal hereditament. (*Saffyn's case*, 5 Rep. 124.) It has been said, a necessary right of way also resembles a

right of common appendant, in not being extinguished by unity of possession. (*Jorden v. Atwood*, Owen, 122; but see *infra*, note (64).)

(61) Any reader who is disposed to pursue inquiries into those branches of the subject, which our author declines here to enter upon, is referred to Co. Litt. 56 a; Com. Dig. tit. *Chemin*; Vin. Ab. tit. *Highway*; and *Catherine Austin's case*, 1 Ventr. 189.

(62) See *post*, p. 396.

[* 36]
prescription,

or exist by operation of law.

church, to market, or the like: in which case the gift or grant is particular, and confined to the grantee alone; it dies with the person; and, if the grantee leaves the country, he cannot assign over his right to any other: nor can he justify taking another *person in his company (*n*). A way may be also by prescription: as if all the inhabitants of such a hamlet, or all the owners and occupiers of such a farm, have immemorially used to cross such a ground for such a particular purpose: for this immemorial usage supposes an original grant, whereby a right of way thus appurtenant to land or houses may clearly be created. A right of way may also arise by act and operation of law: for, if a man grants me a piece of ground in the middle of his field, he at the same time tacitly and impliedly gives me a way to come at it; and I may cross his land for that purpose without trespass (*o*) (63). For when the law doth give any thing to one, it giveth impliedly whatsoever is necessary for enjoying the same (*p*) (64). By the law of the twelve tables at Rome,

(*n*) Finch, Law, 31.

(*o*) Ibid. 63.

(*p*) Co. Litt. 56.

(63) But such a right of way must not be pleaded in general terms as a way of necessity; without showing how the lands over which the right of way is claimed, came to be subjected to that right; that form of pleading would imply that, whenever a man has not another way, he has a right to go over his neighbour's close. But that is not so. A private right of way must be founded in grant, actual or to be presumed; (*Bullard v. Harrison*, 4 Mau. & Selw. 392;) and if an actual grant is found to specify a precise way, no circumstances can authorize the grantee to go out of the particular line specified. The way granted may happen, at some periods, to be overflowed; but if that inconvenience has not been provided for in the grant, it seems, the grantee cannot, merely because the usual track is impassable, go over the grantor's land in another line. (*Taylor v. Whitehead*, 2 Dougl. 749; and see *post*, the next note but one.)

(64) A grant arising out of the implication of necessity, cannot be carried further than the necessity of the case requires. And if, on the ground of necessity, a grant of a new right of way is presumed, a prescription for another old right of way over the same lands will, it seems, be extinguished: and though the new way subsequently ceases to be necessary, and therefore the right to use it also ceases, it does not follow that the old right of way will revive; if the party claiming it has any other way, though a less convenient one, of reaching his own lands. (*Holmes v. Goring*, 2 Bingh. 85.) If, in the case last cited, the *dictum*, that "a way by prescription is extinguished by unity of possession," was only used with reference to the circumstances then before the court, it need not be questioned: but if it was intended to be understood as a general proposition, that a way of necessity is extinguished by unity of possession, and cannot be revived when the

where a man had the right of way over another's land, and the road was out of repair, he who had the right of way might go over any part of the land he pleased (65): which was the established rule in public as well as private ways. And the law of England, in both (66) cases, seems to correspond with the Roman (*q*).

V. Offices, which are a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging, are also incorporeal hereditaments (67);

(*q*) Lord Raym. 725; 1 Brownl. 212; 2 Show. 28; 1 Jon. 297.

possession is severed; that is contrary to the authority before cited in note (60), to *Packer v. Welstead*, (2 Sid. 39,) and to *Dutton v. Taylor*, (2 Lutw. 1489,) and seems not consistent with what was laid down in *Robins v. Barnes* (Hob. 131). When the question relates not to ways of necessity, but to ordinary prescriptive rights of way, or mere easements, the extinguishment of such rights by unity of possession thereof in fee with the same estate in the land over which they ran, seems not to be disputed. (*Buckley v. Coles*, 5 Taunt. 316.) And by other means such rights, if not absolutely extinguished, may at least be suspended; (*Wright v. Rattray*, 1 East, 381;) but ways of necessity do not seem to be extinguished by unity of possession. (*Shury v. Pigott*, 3 Bulstr. 340.) At any rate, they appear to be revivable; (Jenk. Cent. p. 20, c. 37;) or, if not, upon the same principle on which the first grant of the right is often presumed, although the effect of that implied grant were gone, yet, if the same positive necessity called for it, a similar presumption would be again made: but Serjeant Williams, in his learned note to *Pomfret v. Ricroft*, (1 Saund. 323 a) says, a way of necessity cannot be extinguished by unity of possession, for that is the very foundation of the right. And see Bull. N. P. 74 a.

(65) The doctrine of the text may

be true with respect to ways of implied necessity: but not so, perhaps, where the right of way is claimed under a specific grant: (see *ante*, the last note but one;) if, in the latter case, the grantee complains of the bad condition of the road, and asks what remedy he has, if he is not allowed to go out of the prescribed line of road? he would probably be told now, as a party making a similar complaint was told long ago by Mr. Justice Suit, that "if he went that way before in his shoes, he might now pluck on his boots." (*Dike v. Dunston*, Godb. 53; and see the 3rd note of Serjeant Williams to the case of *Pomfret v. Ricroft*, 1 Saund. 322 a.)

(66) Not in both. As to private ways, see the last note: but highways (as Lord Mansfield said in *Taylor v. Whitehead*, Dougl. 479,) are governed by a different principle. They are for the public service, and if the usual track is impassable, it is for the general good that people should be entitled to pass in another line.

(67) And if they savour of the realty as concerning lands or certain places, they are considered to be real property; and the inheritance of such offices, if not incapable of being alienated from a certain line of descendants, may be made the subject of an entail by the owner thereof. (Co. Litt. 20.)

whether public, as those of magistrates; or private, as of bailiffs, receivers, and the like. For a man may have an estate in them, either to him and his heirs, or for life, or for a term of years, or during pleasure only: save only that offices of public trust cannot be granted for a term of years, especially if they concern the administration of justice (68), for then they might perhaps vest in executors or administrators (*r*). Neither can any *judicial* office be granted in reversion: because, though the grantee may be able to perform it at the time of the grant; yet, before the office falls, he may become unable and insufficient: but *ministerial* offices may be so granted (*s*); for those may be executed by deputy (69). Also, by statute 5 & 6 Edw. VI. c. 16, no public office (a few only excepted) shall be sold, under pain of disability to dispose of or hold it (70). For the law presumes that *he, who buys an office, will by bribery, extortion, or other unlawful means, make his purchase good, to the manifest detriment of the public (71).

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(*r*) 9 Rep. 97.(*s*) 11 Rep. 4.

(68) It is not universally true, that offices, even of public trust, cannot be granted for years: and it would be inconsistent to hold, that any of such offices, which may be granted for life, in tail or in fee, could not be granted for years. (*Veale v. Priour*, Hardr. 357; *Jones v. Clerk*, Hardr. 49; *Rogers v. Frazer*, 2 Show. 171.)

By the statute of 1 Geo. III. c. 23, the Judges of the common law courts at Westminster are to hold their offices during their good behaviour, notwithstanding any demise of the crown; but may be removed on an address of both houses of parliament.

(69) Speaking with technical precision, there can be no *reversion* of any office which is not an office of *inheritance*; with respect to other offices, though the word *reversion* may be loosely used in the grant thereof, they would be more properly called grants *in futuro*. (*Young v. Stoell*, Cro. Car. 479; *The King v. Kemp*, Skin. 447.) Though most ministerial

offices, which are not of special trust, may be exercised by deputy, and all offices which may be assigned, may be exercised by deputy; (*Lady Russell's case*, Cro. Jac. 18; *Earl of Shrewsbury's case*, 9 Rep. 49;) yet, an office which is of trust, however humble the situation, cannot be executed by deputy, unless the grant expressly permits this: (Dyer, 7 b, pl. 10 :) *a fortiori* it cannot be assigned. (*Grand Chamberlain's case*, W. Jones, 121.)

(70) The sale and brokerage of offices is further restrained by the statutes of 49 Geo. III. c. 126, and of 6 Geo. IV. cc. 82, 83; and see *Hartwell v. Hartwell*, 4 Ves. 815; *Card v. Hope*, 2 Barn. & Cress. 674; 4 Dowl. & R. 172; *Richardson v. Mellish*, 2 Bing. 246.

(71) If two offices are incompatible, by the acceptance of the latter the first is relinquished and vacant, even if it should be a superior office. (2 T. R. 81.—CH.)

VI. Dignities bear a near relation to offices. Of the nature of these we treated at large in the former book (*t*): it will therefore be here sufficient to mention them as a species of incorporeal hereditaments, wherein a man may have a property or estate (72).

VII. Franchises are a seventh species. Franchise and liberty are used as synonymous terms; and their definition is (*u*), a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject. Being therefore derived from the crown, they must arise from the king's grant; or, in some cases, may be held by prescription, which, as has been frequently said, presupposes a grant (73).

(*t*) See Book i. ch. 12.

(*u*) Finch, L. 164.

(72) Dignities were originally annexed to the possession of certain estates in land, and created by a grant of those estates; or, at all events, that was the most usual course. (*Rex v. Knollys*, 1 L. Raym. 13.) And although dignities are now become little more than personal distinctions, they are still classed under the head of real property; and, as having relation to land, in theory at least, may be entailed by the crown, within the statute *de donis*; or limited in remainder, to commence after the determination of a preceding estate tail in the same dignity. (*Nevil's case*, 7 Rep. 122.) And if a tenant in tail of a dignity should be attainted for felony, the dignity would be only forfeited during his life, but, after his decease, would vest in the person entitled to it *per formam doni*. (Stat. 54 Geo. III. c. 145.) Even if a man in the line of entail of a dignity, but not actually possessed of it, were attainted of treason, his son, surviving him, might claim from the first acquirer, without being affected by the attainder of his father. (2 Hale's Pl. Cr. 356.) But if the father was in possession of the dignity at the time of such attainder, then his corruption of blood would be fatal to the claim of the son; and in the case of a dignity descendible to

heirs general, the attainder for treason of any ancestor, through whom the claimant of such dignity must derive his title, though the person attainted never was possessed of the dignity, will bar such claim. (*Rex v. Purbeck*, Show. P. C. 1; *Law of Forfeiture*, 86, 87.) But with respect to the descent of *land*, after the death of a person attainted, his descendants may inherit, though they may be obliged to trace their descent through him. Stat. 3 & 4 Gul. IV. c. 106.

(73) Our author, in the 17th chapter of this volume, (p. 265,) following Co. Litt. 114, informs us, that "what is to arise by matter of record cannot be prescribed for, but must be claimed by grant, entered on record; such as, for instance, the royal franchises of deodands, felons' goods, and the like. But the franchises of treasure-trove, waifs, estray, and the like, may be claimed by prescription; for they arise from private contingencies, and not from any matter of record." (And see *Keilway*, 123 b, pl. 78; *Constable's case*, 5 Rep. 109; *Foxley's case*, 5 Rep. 110.) In the case of *The Abbot of Strata Marcella*, (9 Rep. 26 b, 27,) the doctrine is laid down thus: Every franchise, liberty, or privilege, either depends on charter, and cannot be claimed by prescription; (as *bona et*

The kinds of them are various, and almost infinite: I will here briefly touch upon some of the principal; premising only, that they may be vested in either natural persons or bodies politic; in one man or in many; but the same identical franchise, that has before been granted to one, cannot be bestowed on another, for that would prejudice the former grant (*w*).

In what they
consist.

To be a county palatine is a franchise, vested in a number of persons. It is likewise a franchise, for a number of persons to be incorporated, and subsist as a body politic; with a power to maintain perpetual succession and do other corporate acts: and each individual member of such corporation is also said to have a franchise or freedom. Other franchises are—to hold a court leet: to have a manor or lordship; or, at least, to have a lordship paramount: to have waifs, wrecks, estrays, treasure-trove, royal fish, forfeitures, and deodands (74): to have a court of one's own, or liberty of holding pleas, and trying causes: to have the cognizance of pleas; which is a still greater liberty, being an exclusive right, so that no other court shall try causes arising within that jurisdiction: to have a bailiwick, or liberty exempt from the sheriff of the county; *wherein the grantee only, and his officers, are to execute all process: to have a fair or market; with the right of taking toll, either there or at any other public places, as at bridges, wharfs, or

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(*w*) 2 Roll. Abr. 191; Keilw. 196.

catalla felonum, &c. ;) or lies in prescription and usage *in pais*, without the help of any charter (as wreck, waif, estrays, &c.). Franchises by charter may be either before time of memory, or within that time. In the first case, such charters not being themselves pleadable as records, they ought to have the aid and support of some other matter of record, within time of memory; either showing them to have been judicially allowed by some court of competent jurisdiction, or to have been confirmed by charter of record within time of legal memory. Usage alone will not support grants by charter before time of memory. But,

with respect to grants which may be claimed by prescription; as they may be originally claimed by usage, which is a matter *in pais*, so usage may support them without the aid of any record, either of creation, allowance, or confirmation. And now, by the statute of 2 & 3 Gul. IV. c. 71, after the enjoyment of any profits *a prendre*, from or upon any land, for the full term of sixty years, the right thereto is indefeasible; unless it is proved that the same was enjoyed by virtue of some consent or agreement expressly made or given for that purpose by deed or writing.

(74) See Vol. I. p. 344.

the like (75); which tolls must have a reasonable cause of commencement, (as in consideration of repairs, or the like,) else the franchise is illegal and void (*x*) (76): or, lastly, to have a forest, chase, park, warren, or fishery, endowed with privileges of royalty; which species of franchise may require a more minute discussion.

As to a *forest*: this, in the hands of a subject, is properly Forest. the same thing with a chase; being subject to the common law, and not to the forest laws (*y*) (77). But a *chase* differs Chase. from a park, in that it is not inclosed, and also in that a man may have a chase in another man's ground as well as in his own, being indeed the liberty of keeping beasts of chase or royal game therein, protected even from the owner of the land, with a power of hunting them thereon. A *park* is an inclosed chase, extending only over a man's own Park. grounds. The word *park* indeed properly signifies an inclosure; but yet it is not every field or common, which a gentleman pleases to surround with a wall or paling, and to stock with a herd of deer, that is thereby constituted a legal park: for the king's grant, or at least immemorial prescrip-

(*x*) 2 Inst. 220.

(*y*) 4 Inst. 314.

(75) See Vol. III. p. 236.

(76) See Vol. III. p. 262.

(77) The doctrine laid down in the text accords with the opinions declared in the case of *Lord Willoughby de Brooke v. Lord Latimer*, (Keilw. 15, 16,) and is no doubt true, as a general position. But, where by the express words of a charter, and proper special provisoes, the king has given authority for the administration of justice according to the forest laws, within a district which has been legally granted to a subject as a forest, that district is subject to the forest laws; but without such express words in the charter, conferring the special jurisdiction, a forest in the hands of a subject is but a chase. (Case of *Leicester Forest*, Cro. Jac. 155; *S. C.* Jenk. Cent. 316; *Rex v. Brydges*, Palm. 62, 90; *S. C.* 2 Bulstr. 298; *Manwood For. L.*; c. 3; 4 Inst. 314.)

Manwood, (c. 1, s. 5,) says, "a fo-

rest is the highest franchise of noble and princely pleasure: next in degree unto it is a liberty of a frank chase: the diversity between a park and a chase is, that a park is inclosed and a chase is always open: the last in degree is the liberty and franchise of a free warren. And therefore, because a forest in dignity is both the highest and the greatest franchise, the same doth comprehend in it a chase, a park, and a free warren; as every general doth comprehend the special." One part of the foregoing statement is not sufficiently precise: inclosure, or non-inclosure, is not the only distinction between a park and a chase. Our author, in the text above, teaches us, that a park can only be made in a man's own property, but a chase may extend over the freeholds of others. (Case of *Forests*, 12 Rep. 22; 4 Inst. 298.)

Free warren.

[* 39]

tion is necessary to make it so (*z*). Though now the difference between a real park, and such inclosed grounds, is in many respects not very material: only that it is unlawful at common law for any person to kill any beasts of park or chase (*a*), except such as possess these franchises of forest, chase, or park. *Free warren* is a similar franchise, erected for preservation or custody (which the word signifies) of beasts and fowls of warren (*b*); which, being *feræ naturæ*, every one had a natural right to kill as he could; but upon *the introduction of the forest laws, at the Norman conquest, as will be shown hereafter (78), these animals being looked upon as royal game and the sole property of our savage monarchs, this franchise of free warren was invented to protect them; by giving the grantee a sole and exclusive power of killing such game so far as his warren extended, on condition of his preventing other persons. A man therefore that has the franchise of warren, is in reality no more than a royal game-keeper; but no man, not even a lord of a manor, could by common law justify sporting on another's soil, or even on his own, unless he had the liberty of free warren (*c*). This franchise is almost fallen into disregard, since the new statutes for preserving the game; the name being now chiefly preserved in grounds that are set apart for breeding hares and rabbits. There are many instances of keen sportsmen in ancient times who have sold their estates, and reserved the free warren, or right of killing game, to themselves; by which means it comes to pass that a man and his heirs have sometimes free-warren over another's

(*z*) Co. Litt. 233; 2 Inst. 199; 11 Rep. 86.

(*a*) These are properly buck, doe, fox, martin, and roe; but in a common and legal sense, extend likewise to all the beasts of the forest: which, besides the other, are reckoned to be hart, hind, hare, boar, and wolf, and, in a word, all wild beasts of venery or hunting. (Co. Litt. 233.)

(*b*) The beasts are hares, conies, and roes; the fowls are either *campestres*, as partridges, rails, and quails;

or, *sylvestres*, as woodcocks and pheasants; or *aquatiles*, as mallards and herons. (Ib.)

[Manwood, For. L. c. 4, s. 3, gives a different account: he says, (and supports his opinion by referring to the Regist. Brev. fol. 93,) there are only two beasts of warren, the hare and the coney, and but two fowls of warren, the pheasant and the partridge.—ED.]

(*c*) Salk. 637.

(78) See *ante*, chap. 1, p. 14, and *post*, chap. 27, p. 403.

ground (*d*) (79). A *free fishery*, or exclusive right of fishing Free fishery. in a public river, is also a royal franchise; and is considered as such in all countries where the feudal polity has prevailed (*e*); though the making such grants, and by that means appropriating what seems to be unnatural to restrain, the use of running water, was prohibited for the future by King John's great charter; and the rivers that were fenced in his time were directed to be laid open, as well as the forests to be disafforested (*f*). This opening was extended by the second (*g*) and third (*h*) charters of Henry III., to those also that were fenced under Richard I.; so that a franchise of free fishery ought now to be at least as old as the reign of Henry II. This differs from a *several* fishery; Several fishery. because he that has a several fishery must also be (or at least derive his right from) the owner of the soil (*i*), which in a free fishery is not requisite (80). It differs also from a *common* of piscary before mentioned, in that the free fishery is an exclu*sive right, the common of piscary is not so: and [* 40] therefore, in a free fishery, a man has a property in the fish before they are caught; in a common of piscary not till afterwards (*k*). Some indeed have considered a *free* fishery not as a royal franchise, but merely as a private grant of a liberty to fish in the *several* fishery of the grantor (*l*). But to consider such right as originally a flower of the preroga-

(*d*) Bro. Abr. tit. *Warren*, 3.

(*h*) 9 Hen. III. c. 16.

(*e*) Seld. Mar. Claus. i. 24; Dufresne, v. 503; Crag. de Jur. Feod. II. 8, 15.

(*i*) M. 17 Edw. IV. 6. P. 18 Edw. IV. 4. T. 10 Hen. VII. 24, 26; Salk. 637.

(*f*) Cap. 47, edit. Oxon.

(*k*) F. N. B. 88; Salk. 637.

(*g*) Cap. 20.

(*l*) 2 Sid. 8.

(79) If the king has granted a warren within a manor, and the owner infeoffs the king of the manor, without saying, and the *appurtenances*, the warren will not pass from the grantor: for a man may well have a free warren in the lands of others. (Dyer, 30 b, pl. 309.)

(80) The qualification of this passage, which our author, with great candour, himself made, by adding the sentence with which this section concludes, (and which did not appear in the early editions of the commenta-

ries,) renders it unnecessary to say more upon the subject, except perhaps to observe, that the question, whether a person can have a several fishery without being owner of the soil, does not yet appear to be quite settled. (*Seymour v. Lord Courtenay*, 5 Burr. 2816; *Kinnersley v. Orpe*, Dougl. 56 a.) From the case of *Seymour v. Lord Courtenay* we learn, that a right of *several* fishery does not necessarily imply an *exclusive* right, but may exist where no other person has a *co-extensive* right in the subject claimed.

tive, till restrained by *magna charta*, and derived by royal grant (previous to the reign of Richard I.) to such as now claim it by prescription, and to distinguish it (as we have done) from a *several* and a *common* of fishery, may remove some difficulties in respect to this matter, with which our books are embarrassed. For it must be acknowledged, that the rights and distinctions of the three species of fishery are very much confounded in our law-books; and that there are not wanting respectable authorities (*m*) which maintain that a *several* fishery may exist distinct from the property of the soil, and that a *free* fishery implies no exclusive right, but is synonymous with *common* of piscary.

VIII. Corodies.

VIII. Corodies are a right of sustenance, or to receive certain allotments of victual and provision for one's maintenance (*n*). In lieu of which (especially when due from ecclesiastical persons) a pension or sum of money is sometimes substituted (*o*). And these may be reckoned another species of incorporeal hereditaments; though not chargeable on, or issuing from, any corporeal inheritance, but only charged on the person of the owner in respect of such his inheritance. To these may be added,

IX. Annuities.

In what an annuity differs from a rent-charge.

IX. Annuities, which are much of the same nature, only that these arise from temporal, as the former from spiritual persons. An annuity is a thing very distinct from a rent-charge, with which it is frequently confounded: a rent-charge being a burthen imposed upon and issuing out of *lands*, whereas an annuity is a yearly sum chargeable only upon the *person* of the grantor (*p*). Therefore, if a man by deed grant to another the sum of 20*l.* *per annum*, without expressing out of what lands it shall issue, no land at all shall be charged with it; but it is a mere personal annuity: which is of so little account in the law, that if granted to an eleemosynary corporation, it is not within the statutes of mortmain (*q*); and yet a man may have a real estate in it, though his security is merely personal (81).

(*m*) See them well digested in Hargrave's notes on Co. Litt. 122, (23).

(*n*) Finch, L. 162.

(*o*) See book i. ch. 8. [Vol. I. pp. 283, 381.]

(*p*) Co. Litt. 144.

(*q*) Ibid. 2.

(81) This appears to require some explanation. If an annuity (not charg-

ed on lands) be granted to a man and his heirs, it is a fee simple *personal*.

X. Rents are the last species of incorporeal hereditaments. The word rent or render, *reditus*, signifies a compensation or return, it being in the nature of an acknowledgment given for the possession of some corporeal inheritance (*q*). It is defined to be a certain profit issuing yearly out of lands and tenements corporeal. It must be a *profit*; yet there is no occasion for it to be, as it usually is, a sum of money: for spurs, capons, horses, corn, and other matters may be rendered, and frequently are rendered, by way of rent (*r*). It may also consist in services or manual operations; as, to plough so many acres of ground, to attend the king or the lord to the wars, and the like; which services in the eye of the law are profits. This profit must also be *certain*; or that which may be reduced to a certainty by either party. It must also issue *yearly*; though there is no occasion for it to issue every successive year; but it may

X. Rents. [See Vol. III. p. 230.]

Definition of a rent.

(*q*) Co. Litt. 144.

(*r*) Ibid. 142.

(Co. Litt. 2 a.) And Mr. Hargrave, in his note upon the passage just cited, says, though an annuity of inheritance is held to be forfeitable for treason, as an hereditament; (7 Rep. 34 b;) yet, being only *personal*, it is not an hereditament within the statute of mortmain, (7 Edw.-I. st. 2,) nor is it entailable within the statute *de donis*. Lord Coke again says, (Co. Litt. 20 a,) “if I, by my deed, for me and my heirs, grant an annuity to a man, and the heirs of his body, this concerneth no land, nor savoureth of the reality.” (And see *Earl of Stafford v. Buckley*, 2 Ves. sen. 177; *Holderness v. Carmarthen*, 1 Br. 382; *Aubin v. Daly*, 4 Barn. & Ald. 59.) Some of the diversities between a rent and an annuity are thus laid down, in the 30th chapter of the Doctor and Student, Dialogue 1.—“Every rent, be it rent-service, rent-charge, or rent-seck, is going out of land. Also, of an annuity there lieth no action, but only a writ of annuity: but of a rent the same action may lie as doth of land. Also, an annuity is never taken for

assets, because it is no freehold in the law, nor shall it be put in execution upon a statute merchant, statute staple, or *elegit*, as a rent may.” No doubt, when an annuity is granted, so as to bind both the person and real estate of the grantor, the grantee hath his election, either to bring a writ of annuity, treating his demand as a personal one only, or to distrain upon the land, as for a real interest. (Co. Litt. 144 b.) The definition which Fitzherbert (N. B. p. 152) gives of an annuity is, that it either proceeds from the lands or the coffers of another. Where it is charged upon land, it may be real or personal, at the election of the holder. If it is out of the coffers, it is personal only as to the remedy; but the property itself may be *real as to its descent to the heir*. And this seems to be the only sense in which an annuity, for which the security is merely personal, can be called real estate. (*Turner v. Turner*, Ambl. 782. See *ante*, p. 16, n. and *post*, p. 113, n.)

be reserved every second, third, or fourth year(s): yet, as it is to be produced out of the profits of lands and tenements, as a recompense for being permitted to hold or enjoy them, it ought to be reserved yearly, because those profits do annually arise and are annually renewed. It must *issue out* of the thing granted, and not be part of the land or thing itself; wherein it differs from an exception in the grant, which is always of part of the thing granted (*t*). It must, lastly, issue out of *lands and tenements corporeal* (82); that is, from some inheritance whereunto the owner or grantee of the rent may have recourse to distrain. Therefore a rent cannot be reserved out of an advowson, a common, an office, a franchise, or the like (*u*). But a grant of such annuity or sum may operate as a personal contract, and oblige the grantor to pay the money reserved, or subject him to an action of debt (*w*) (83): though it doth not affect the inheritance, and is no legal rent in contemplation of law.

(*s*) Co. Litt. 47.

(*u*) Co. Litt. 144.

(*t*) Plowd. 13 ; 8 Rep. 71.

(*w*) Ibid. 47.

(82) See *post*, p. 209.

(83) To determine the legality of leases, by ecclesiastical persons, of tithes or other incorporeal hereditaments, lying in grant and not in livery, respecting which doubts had existed, notwithstanding the ancient rent or yearly sum was reserved in such leases, and all the other requisites prescribed by the act of parliament previously in being, were duly attended to; and also to remove the doubts, whether there was any remedy for recovering the rent or yearly sum so reserved, by reason that there is generally no place wherein a distress can be had or taken for such rent or yearly sum; it was enacted by the statute of 5 Geo. III. c. 17, that such leases were valid, and that the arrears of rent, or yearly sum reserved in such leases, may be recovered by *action of debt*. Whether a lay impropriator, who has demised his tithes for life, reserving an annual payment, but without an express covenant on the part of the lessee to

discharge it, comes within the letter of this act, has been doubted by Mr. Wooddeson. (21 Vin. Lect.) The ground of the doubt is, that the statute only specifies ecclesiastical persons and corporations; but Mr. Wooddeson thinks that, even if a lay impropriator had no remedy at law for recovery of the arrears of the annual sums reserved on such a lease, he would obtain relief in equity. The legal objection, he intimates, would be, that an action of debt, being a personal action, is not at common law maintainable to recover a rent reserved on a freehold lease; and that, although this is remedied by the statute of 8 Ann. c. 14, s. 4, as to *proper* rents issuing out of *corporeal* hereditaments, it is questionable whether that statute applies to annual payments reserved in leases of *incorporeal* hereditaments, which are *not properly rents*, because they want the remedy of distress. However this objection (should it ever be taken in practice) may be dis-

There are at common law (*x*) three manner of rents, rent-service, rent-charge, and rent-seck. *Rent-service* is so called *because it hath some corporal service incident to it, as at the least *fealty* (84) or his feudal oath of fidelity (*y*). For, if a tenant holds his land by fealty, and ten shillings rent, or by the service of ploughing the lord's land, and five shillings rent, these pecuniary rents being connected with personal services, are therefore called rent-service. And for

At common law there are three manner of rents, viz.

rent-service,

[* 42]

(*x*) Litt. § 213.

(*y*) Co. Litt. 142.

posed of; it is clear that, in all other respects, except as to the remedy by distress, payments out of incorporeal hereditaments follow the general nature of rents, and, in case of the lessor's decease, will go to his heirs, as incident to the reversion, and not to his personal representatives. (*Tipping v. Grover*, T. Raym. 18; *Bally v. Wells*, Wilmot's Notes, 348.) In his 12th note to *The Dean and Chapter of Windsor v. Gover*, (2 Saund. 305,) Serjeant Williams seems to have no doubt that the statute of 8 Anne does enable lay impropriators to make leases of tithes for life, and to bring debt for the rent: but this opinion is not founded upon any words in the act expressly naming lay impropriators; and does not seem to be an absolutely necessary, though it certainly is not a forced, inference from the 7th section of the statute of 34 Hen. VIII. c. 7, which, for many purposes, but not expressly for the one in question, puts tithes in the hands of lay-impropriators upon the same footing with their corporeal hereditaments.

A rent may be reserved to the king in a grant of incorporeal hereditaments, because, by his prerogative, he may distrain for such rent on all the lands of his lessee. As he has a remedy, there is no reason why such reservation should be void. Upon analogous principle, a subject may reserve a rent upon a grant of an estate in remainder or reversion; for though the grantee cannot distrain during the

continuance of the particular estate, yet, there will be a remedy by distress whenever the remainder or reversion comes into possession. So, where a person grants a future interest in lands, he may reserve a rent immediately; if it be a lease for years, it will be a contract upon which an action for debt may be grounded as soon as any arrears accrue; and the lessor may have his remedy by distress, when the lease comes into possession. (Cruise's Dig. tit. 28, c. 1, ss. 22, 23, 25; citing 1 Inst. 47 a, and 2 Rolle's Abr. 446.)

It may, perhaps, be thought, that some of the instances, given in the text, of services which have been held to constitute good rents, are not quite consistent with that part of the definition of a rent which says, it must be *certain*, and must also issue *yearly*: but Lord Coke has anticipated this objection, and observed (in 1 Inst. 96,) it is a maxim in law, that no distress can be taken for any services that are not put into certainty, or cannot be reduced to any certainty. But, *id certum est, quod certum reddi possit*; and in some cases there may be a certainty in uncertainty; as a man may hold of his lord to shear all the sheep depasturing within the lord's manor; and this is certain enough, albeit the lord hath sometime a greater number, and sometime a lesser number there; *et sic de similibus*.

(84) See Vol. III. p. 233, and *post*, pp. 45, 101.

rent-charge,

rent-seck.

Other species of
rents are—
Rents of *assise*,

[* 43]
rack-rents, and
fee-farm rents.

these, in case they be behind, or arrere, at the day appointed, the lord may distrain of common right, without reserving any special power of distress; provided he hath in himself the reversion, or future estate of the lands and tenements, after the lease or particular estate of the lessee or grantee is expired (z). A *rent-charge* is where the owner of the rent hath no future interest, or reversion expectant in the land; as where a man by deed maketh over to others his *whole* estate in fee-simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress, that if the rent be arrere or behind, it shall be lawful to distrain for the same. In this case the land is liable to the distress, not of common right, but by virtue of the clause in the deed; and therefore it is called a *rent-charge*, because in this manner the land is charged with a distress for the payment of it (a). *Rent-seck*, *reditus siccus*, or barren rent, is in effect nothing more than a rent reserved by deed, but without any clause of distress.

There are also other species of rents, which are reducible to these three. Rents of *assise* are the certain established rents of the freeholders and ancient copyholders of a manor (b), which cannot be departed from or varied. Those of the freeholders are frequently called *chief-rents*, *reditus capitales*; and both sorts are indifferently denominated *quit-rents*, *quieti reditus*; because thereby the tenant goes quit and free of all other services. When these payments were reserved in silver or white money, they were anciently called *white-rents*, or *blanch-farms*, *reditus albi* (c); in contradistinction to rents reserved in work, grain, or baser money, which were called **reditus nigri*, or *black-mail* (d). *Rack-rent* is only a rent of the full value of the tenement, or near it. A *fee-farm* rent is a rent-charge issuing out of an estate in fee; of at least one-fourth of the value of the lands (85), at the time of its reservation (e): for a grant of

(z) Litt. s. 215.

(a) Co. Litt. 143.

(b) 2 Inst. 19.

(c) In Scotland this kind of small

payment is called *blanch-holding*, or *reditus albæ firmæ*.

(d) 2 Inst. 19.

(e) Co. Litt. 143.

(85) This passage of the text has been the subject of considerable controversy. Mr. Hargrave (in note (5)

to Co. Litt. 144 a) holds, that the name *fee-farm* is founded upon the *perpetuity* of the rent or service, not

lands, reserving so considerable a rent, is indeed only letting lands to farm in fee-simple instead of the usual methods for life or years.

These are the general divisions of rent; but the difference between them (in respect to the remedy for recovering them) is now totally abolished; and all persons may have the like remedy by distress for rents-seck, rents of assize, and chief-rents (86), as in case of rents reserved upon lease (*f*).

The remedy for their recovery, the like in all.

Vol. III. p. 6.

Rent is regularly due and payable upon the land from whence it issues, if no particular place is mentioned in the reservation (*g*): but in case of the king, the payment must be either to his officers at the Exchequer, or to his receiver in the country (*h*). And strictly the rent is demandable and payable before the time of sun-set of the day whereon it is

Where rent is payable.

At what time.

(*f*) Stat. 4 Geo. II. c. 28.

(*h*) 4 Rep. 73.

(*g*) Co. Litt. 201.

on the *quantum*: and he is of opinion, that the term of fee-farm is not properly applicable to any rents except rent-service. In the notes to *Bradbury v. Wright*, (2 Doug. 627,) it is contended, that a fee-farm rent may either be a rent-seck, or a rent-charge, but, unless it was created before the statute of *quia emptores*, or by a grant of the crown, cannot be a rent-service: because since that statute, no man can create a *tenure* of himself in *fee*. (See *post*, pp. 72, 92.) Blackstone's error, (it is there added) appears only to have been in stating that it *must* be a rent-charge, by taking that which was simply meant by Lord Coke as an *instance*, to be a *definition* of a fee-farm rent; but (it is further held, upon apparently very sufficient authority,) our author is quite justified in saying, that the *quantum* of a fee-farm rent must have been, at the time of its creation, not less than one fourth of the value of the lands, in the grant of which it was reserved. The annotator on *Bradbury v. Wright*, concludes

thus—where there is a lease in fee-farm since the statute of *quia emptores*, there may be a fee-farm rent which is *not* a rent-service; but where there is *tenure in fee-farm*, (which must have been created, if it proceeded from the grant of a subject, before the statute,) that rent is rent-service.

(86) The 5th section of the statute of Geo. II. cited by our author as his authority limits the remedies thereby given for the recovery of rent-seck, rents of assize, and chief rents, to the cases of such of the said rents as had been duly answered and paid for the space of three years, within the space of twenty years before the first day of the Session of Parliament in which the act was passed, or which should thereafter be created.

And it is essential, that an avowry for a distress in respect of a rent-seck should pursue the terms of the statute, and bring the case within it. (*Bradbury v. Wright*, Doug. 627 a, 628.)

reserved (*i*); though perhaps not absolutely due till midnight (*k*).

With regard to the original of rents, something will be said in the next chapter; and, as to distresses and other remedies for their recovery, the doctrine relating thereto, and the several proceedings thereon, these belong properly to the third part of our commentaries, which will treat of civil injuries, and the means whereby they are redressed.

(*i*) Co. Litt. 302; 1 Anders. 253.

(*k*) 1 Saund. 287; Prec. Chanc. 555; Salk. 578.

CHAPTER IV.

OF THE FEODAL SYSTEM.

It is impossible to understand, with any degree of accuracy, either the civil constitution of this kingdom, or the laws which regulate its landed property, without some general acquaintance with the nature and doctrine of feuds, or the feudal law : a system so universally received throughout Europe upwards of twelve centuries ago, that Sir Henry Spelman (*a*) does not scruple to call it the law of nations in our western world (1). This chapter will be therefore de-

A general acquaintance with the nature and doctrine of feuds, or the feudal law, necessary.

(*a*) Of Parliaments, 57.

(1) The feudal laws derived their origin from the military hordes of Northern Europe. The institutions admitted by these semi-barbarians, while they remained in their native forests and marshes, added to the very peculiar situation in which they were placed when they settled in the countries which they conquered, naturally produced a particular system of laws and policy ; which system was established by every one of the tribes in question, however different in their dialects, or unconnected by alliances. The plan of distributing among a conquering people the lands they have conquered, and of annexing to the benefit a condition of military service, is too obvious a one not to have been frequently acted upon by other nations ; but this simple plan was almost necessarily modified by the particular

circumstances attending the conquests made by the people of the north of Europe, when they planted themselves in the Roman empire. In most other conquests, of which history has preserved to us any records, the conquerors either conformed to the civil laws of the conquered people, (if they left a people at all,) reserving to themselves the political and military administration ; or they retained their own laws among themselves, leaving to the conquered people the enjoyment of theirs. But the swarms which issued from the northern hive, had been subjected to no general system of government in their own countries, and they had no conception of a regular standing army. Yet the nations they conquered were more numerous, as well as more polished and expert in all civil arts, than themselves. Under

dedicated to this inquiry. And though, in the course of our observations in this and many other parts of the present book, we may have occasion to search pretty highly into the antiquities of our English jurisprudence, yet surely no industrious student will imagine his time misemployed, when he is led to consider that the obsolete doctrines of our laws are frequently the foundation upon which what remains is erected; and that it is impracticable to comprehend many rules of the modern law, in a scholar-like scientific manner, without having recourse to the ancient. Nor will these researches be altogether void of rational entertainment as well as use: as in viewing the majestic ruins of Rome or Athens, of Balbec or Palmyra, it administers both pleasure and instruction to compare them with the draughts of the same edifices, in their pristine proportion and splendour.

Its origin.

[* 45]

*The constitution of feuds (*b*) had its original from the military policy of the northern or Celtic nations, the Goths, the Huns, the Franks, the Vandals, and the Lombards, who all migrating from the same *officina gentium*, as Crag very justly entitles it (*c*), poured themselves in vast quantities into all the regions of Europe, at the declension of the Roman empire. It was brought by them from their own countries (2) and continued in their respective colonies as the

(*b*) See Spelman of Feuds, and Wright of Tenures, *per tot.*

(*c*) *De jure feod.* 19, 20.

such circumstances, it followed, in the course of things, that being an army, these conquerors would fall into a subordination of a military character in their settlement; and that institutions should be established amongst them making it an obligation upon almost the whole body, to be ready at a military call. This settlement, subordination and obligation to military service, carried in themselves a system of laws, without the plan of a legislator, which, however the laws of the conquered people might for some time subsist, could not fail in the end to swallow up all the laws of all the countries in which it was received. We are apt to believe this system the result

of the most consummate political prudence and refinement; but regular and extensive as the fabric became, it was originally no more than the very natural consequence of the causes above mentioned. The principles of the feudal system were founded in conquest; and all its provisions tended to preserve the fruits of that conquest. (See Dalrymple's Essay on Feud. Prop. cc. 1, 2.)

(2) This, if meant to be understood as a general proposition, is very questionable. It rather appears that the feudal system first grew out of the foreign conquests made by the northern nations; instead of having been an institution previously matured by

most likely means to secure their new acquisitions: and to that end, large districts or parcels of land were allotted by the conquering general to the superior officers of the army, and by them dealt out again in smaller parcels or allotments to the inferior officers and most deserving soldiers (*d*). These allotments were called *feoda* (3), feuds, fiefs, or fees;

(*d*) Wright, 7.

them at home. (See the last note.) Montesquieu, resting his assertion on the two best, (not to say, the only good) authorities on the subject, tells us (in the third chapter of his 30th book on the *Spirit of Laws*,) that, among the Germans, there were vassals, but no *fiefs*; they had no fiefs, because the princes had no lands to give; or rather their fiefs consisted in horses trained for war, in arms, or feasting. There were vassals, because there were trusty men, who, being *bound* by their *word*, engaged to follow the prince to the field, and did very nearly the same service which was, afterwards, performed *for the fiefs*.

If Blackstone only meant to speak of the introduction of feuds into this country, he would be countenanced by many other writers in assuming that, when the Saxons took possession of the greater part of Britain, putting a large portion of the native population to the sword, they either brought with them, or very soon adopted, some of the principles and practices of feudality; though it is so clear that the system never attained its full maturity here, before the Norman conquest, that many writers, of great learning and reputation, have been disposed to ascribe, not merely the completion, but, the erection of the fabric of feudal government in England, to William the Conqueror. A summary of several of the arguments on both sides may be found either in a note to 1 Hale's Hist. of C. L. 190—201, or in the 2nd chap. of Wright's Law of Ten.

Dalrymple holds that, when the Saxons settled here, certain portions of the land were reserved for the prince, and others parcelled out among the chieftains; and that both the prince and chieftains again, naturally settled upon their lands their followers of inferior degree, and their slaves. But, he says, we are not to imagine that the whole land of the country was so distributed, or so holden. Much of it continued to be still allodial: and even in those lands which were held by feudal tenure, the feudal relations were far from running in that regular subordination which, in after ages, made the feudal dependencies complete. The outlines of the feudal system may be traced amongst the Saxons; but that system was not completed till after the Norman conquest. In this conclusion it is believed the reader may safely rest: and it is that which our author will be found, a few pages hence, in effect to support.

(3) The name of *feuda* was not given to such allotments at first. (See Vol. IV. p. 107.) Muratori tells us they were originally called *beneficia*; and then, such donations, stipends, or benefits, only conferred the usufruct of a portion of the royal demesnes during the life of the donor. (Antiq. Ital. Med. Ævi. dissert. 11.) So, Balusius informs us, these donations, being gratuitous, were originally called *beneficia*; in course of time they acquired the name of *feuda*. (i. Capit. 453. ii. Capit. 875.) Somner, likewise, in quaint language, calls "*beneficium*,

which last appellation in the northern languages (*e*) signifies a conditional stipend or reward (*f*). Rewards or stipends they evidently were: and the condition annexed to them was, that the possessor should do service faithfully, both at home and in the wars, to him by whom they were given; for which purpose he took the *juramentum fidelitatis*, or oath of fealty (*g*) (4): and in case of the breach of

(*e*) Spelm. Gl. 216.

(*f*) Pontoppidan, in his history of Norway (page 290) observes, that in the northern languages *odh* signifies *proprietas* and all *totum*. Hence he derives the *odhal* right in those countries; and thence too, perhaps, is derived the *udal* right in Finland, &c. (See Mac Doual. Inst. part 2.) Now, the transposition of these northern syllables, *alloth*, will give us the true etymology of the *allodium*, or absolute property of the feudists, as, by a similar combination of the latter syllable with the word *fee* (which signifies, we have seen, a conditional reward or stipend,) *feeth*, or *feodum*, will denote stipendiary property.

[Somner, in his Treat. on Gavelk. (prop. 4,) after going deeply into Teutonic learning on the subject, substantially agrees with our author as to the derivation of these words. In summing up his argument, (p. 111,) he

says, "Shortly then, *feudum* or fee, (considered in its first and primary acceptation, to which they must have regard, that will hope to judge aright of the ground for the first imposition of the name,) is no more than what was holden in fee-hode, by contraction feud, or feod: *i. e.* in a stipendiary, conditional, mercenary, mediate way and nature, and with the acknowledgment of a superior lord, and a condition of returning him some service for it, upon the withdrawing whereof the land was revertible unto the lord. *Allodium* is, contrarywise, what is holden in all-hode, in totality, in a full, absolute immediate manner, without any acknowledgment of a superior lord, and free from any tie or compact for returning any service at all for it unto any."—ED.]

(*g*) See this oath explained at large in Feud. l. 2, t. 7.

feudum's elder brother," and declares that *feudum* was a word unknown until about the year 1000. (Treat. on Gavelk. 102.) And Spelman says, these stipends, whilst they were held at the pleasure of the donor, were called *munera*. Afterwards, when they became grants for a certain term, or for life, they were called *beneficia*; and they were first called *feuda* when they began to be granted in perpetuity, and not before. (Treat. of Feuds, 4, 6, 9.)

(4) Fealty, the essential feudal bond, is so necessary to the very notion of a feud, that it is a downright contradiction to suppose the most improper

feud to subsist without it; but the other properties or obligations of an original feud may be qualified, or varied by the tenor, or express terms of the feudal donation. (Wright, L. of Ten. 35.) Fealty and homage are sometimes confounded; but they do not necessarily imply the same thing. Fealty was a solemn oath, made by the vassal, of fidelity and attachment to his lord. Homage was merely an acknowledgment of tenure, unless it was performed as *homagium ligeum*: that, indeed, did in strictness include allegiance as a subject, and could not be renounced; but *homagium non*

this condition and oath, by not performing the stipulated service, or by deserting the lord in battle, the lands were again to revert to him who granted them (*h*).

Allotments, thus acquired, naturally engaged such as accepted them to defend them: and, as they all sprang from the same right *of conquest, no part could subsist independent of the whole; wherefore all givers as well as receivers were mutually bound to defend each other's possessions. But, as that could not effectually be done in a tumultuous irregular way, government, and to that purpose subordination, was necessary. Every receiver of lands, or feudatory, was therefore bound, when called upon by his benefactor, or immediate lord of his feud or fee, to do all in his power to defend him. Such benefactor or lord was likewise subordinate to, and under the command of, his immediate benefactor or superior; and so upwards to the prince or general himself: and the several lords were also reciprocally bound in their respective gradations, to protect the possessions

Its effects.

[* 46]

(*h*) Feud. l. 2, t. 24.

ligeum contained a saving or exception of faith due to other lords, and the homager might at any time free himself from feudal dependence, by renouncing the land with which he had been invested. (Du Fresne Gloss. voc. *Hominium, Legius, et Fidelitas*.) Mr. Hargrave (in note 1, to Co. Litt. 68 a) says, in some countries on the continent of Europe, homage and fealty are blended together, so as to form one engagement; and therefore, foreign jurists frequently consider them as synonymous. But, in our law, whilst *both* continued, they were in some respects distinct: fealty was sometimes done where homage was not due. (See *post*, p. 53, n.) And Lord Coke himself tells us, (1 Inst. 151 a,) fealty may remain, where homage is extinct. So, Wright, (L. of Ten. 55, in note,) informs us, that it appears not only from the concurrent testimony of all our most authentic ancient historians, (whom he

cites,) but likewise from Britton, Bracton, the Mirror, and Fleta, that homage and fealty were really with us distinct, though (generally) concomitant, engagements: and that homage, (he of course means *homagium non ligeum*,) was merely a declaration of the homager's consent to become the military tenant of certain of the lord's lands or tenements.

The short result appears to be, that, whilst the tie of homage subsisted, fealty, (subject in certain cases, to the saving or exception before mentioned,) though acknowledged by a distinct oath, was consequential thereto; but that the converse did not hold, as fealty might be due where homage was not. (See *post*, p. 53, n. Vol. III. p. 230.)

The manner of doing homage and fealty, is prescribed by the act of 17 Edw. II. st. 3, which enactment abundantly proves the distinct nature of the two acknowledgments at that time.

Its policy.

they had given. Thus the feudal connexion was established, a proper military subjection was naturally introduced, and an army of feudatories was always ready enlisted, and mutually prepared to muster, not only in defence of each man's own several property, but also in defence of the whole, and of every part of this their newly-acquired country (*i*); the prudence of which constitution was soon sufficiently visible in the strength and spirit with which they maintained their conquests.

The universality and early use of this feudal plan (5), among all those nations, which in complaisance to the Romans we still call barbarous, may appear from what is recorded (*k*) of the Cimbri and Teutones, nations of the same northern original as those whom we have been describing, at their first irruption into Italy about a century before the Christian æra. They demanded of the Romans, "*ut martius populus aliquid sibi terræ daret, quasi stipendium: cæterum, ut vellet, manibus atque armis suis uteretur.*" The sense of which may be thus rendered: they desired stipendiary lands (that is, feuds) to be allowed them, to be held by military and other personal services, whenever their lord should call upon them. This was evidently the same constitution, that displayed itself more fully about seven hundred years afterwards; when the Salii, Burgundians, and Franks broke in upon Gaul, the Visigoths on * Spain, and the Lombards upon Italy; and introduced with themselves this northern plan of polity, serving at once to distribute and to protect the territories they had newly gained. And from hence too it is probable that the emperor Alexander Severus (*l*) took the hint, of dividing lands conquered from the enemy among his generous and victorious soldiery, duly stocked with cattle and bondmen, on condition of

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(*i*) Wright, 8.

(*k*) L. Florus, l. 3, c. 3.

(*l*) "*Sola, quæ de hostibus capta sunt, limitaneis ducibus et militibus donavit; ita ut eorum ita essent, si hæredes illorum militarent, nec unquam ad privatos pertinerent: dicens attentius illos militaturos, si etiam*

sua rura defenderent. Addidit sane

his et animalia et servos, ut possent

colere quod acceperant; ne per ino-

piam hominum vel per senectutem

defererentur rura vicina barbariæ,

quod turpissimum ille ducebat." (Æl.

Lamprid. in *Vita Alex. Severi.*)

(5) See *ante*, notes (1) & (2,) to this chapter.

receiving military service from them and their heirs for ever.

Scarce had these northern conquerors established themselves in their new dominions, when the wisdom of their constitutions, as well as their personal valour, alarmed all the princes of Europe; that is, of those countries which had formerly been Roman provinces, but had revolted, or were deserted by their old masters, in the general wreck of the empire. Wherefore most, if not all, of them thought it necessary to enter into the same or a similar plan of policy. For whereas, before, the possessions of their subjects were perfectly *allodial* (6), (that is, wholly independent, and held of no superior at all,) now they parcelled out their royal territories, or persuaded their subjects to surrender up and retake their own landed property, under the like feudal obligations (7) of military fealty (*m*). And thus, in the com- Its progress.

(*m*) Wright, 10.

(6) One striking difference between allodial and feudal tenure consisted in this,—allodial lands entered into commerce. They were saleable or otherwise alienable, at the pleasure of the possessor, either by deed or will; and they were attachable to answer his debts. But, the holder of a fief was only an usufructuary; he could not alienate the lands without the consent of the lord, and also of his own male issue, if he had any born at the time; even supposing he was the first purchaser of the fee; and if he took it by descent, after the doctrine of collateral descent was established, then the consent of all the living collaterals who might possibly become entitled to the succession, was likewise required. Feudal estates also were not liable to the debts contracted by the feudatory; for this would have deprived the lords, and the heirs of the tenants, of their rights. Neither could the creditor attach the profits of the land during the life of the debtor; for this might have rendered the vassal incapable of the duties of

the fief. But, as the strictness of the military system abated; as commerce increased, and with it luxury; the propensity to alienation became irresistible.

As to the gradual progress by which this was effected, see *post*, pp. 71, 289. See also, Sullivan's 15th Lecture on the Laws of England.

(7) The mode of making this change, when it was, or bore the semblance of being, a voluntary act, effected by course of law, is detailed by Marculfus, (book 1, formulary 13;) the owner of the land gave it to the king, who restored it to the donor, by way of usufruct, or feudal benefice. And the civil security, and political advantages, which a feudatory enjoyed, were in some respects so much superior to those which an allodial proprietor could depend upon, in those days of anarchy and violence, that it is not unreasonable to believe the conversion of absolute allodial properties into conditional feudal tenures, was frequently voluntary. (See Montesquieu, book 31, chap. 8.)

pass of a very few years, the feudal constitution, or the doctrine of tenure, extended itself over all the western world. Which alteration of landed property, in so very material a point, necessarily drew after it an alteration of laws and customs: so that the feudal laws soon drove out the Roman, which had hitherto universally obtained, but now became for many centuries lost and forgotten; and Italy itself (as some of the civilians, with more spleen than judgment, have expressed it) *belluinas, atque ferinas, immanesque Longobardorum leges accepit* (n).

The period of its reception in this country.

[* 48]

*But this feudal polity, which was thus by degrees established over all the continent of Europe, seems not to have been received in this part of our island, at least not universally and as a part of the national constitution, till the reign of William the Norman (o). Not but that it is reasonable to believe, from abundant traces in our history and laws, that even in the times of the Saxons, who were a swarm from what Sir William Temple calls the same northern hive, something similar to this was in use; yet not so extensively nor attended with all the rigour that was afterwards imported by the Normans. For the Saxons were firmly settled in this island, at least as early as the year 600: and it was not till two centuries after, that feuds arrived to their full vigour and maturity, even on the continent of Europe (p) (8).

Its gradual establishment by the Norman barons.

This introduction, however, of the feudal tenures into England, by King William, does not seem to have been effected immediately after the conquest (9), nor by the mere

(n) Gravin. Orig. l. 1, s. 139.

c. 16, s. 7.

(o) Spelm. Gloss. 218; Bract. l. 2,

(p) Crag, l. 1, t. 4.

(8) See *ante*, note (2) to this chapter. The reader, who wishes to go further into the inquiry how far the institutions of feudality, or regulations analogous thereto, were established in this country in the time of the Saxons, will do well to consult Turner, (*Hist. of Anglo-Sax.* book 9, chap. 3,) where he will find sufficient evidence that, to Saxon grants of land conditions of military service were generally annexed; but, he will also see reason to conclude that such grants, and the *ex-*

peditio militaris with which they were burthened, were, in several essential respects, very different from the tenures of feuds, as created by the military policy of the Normans.

(9) Wright (in his *Law of Ten.* 52—57) observes, “it is very remarkable, that William I., about the twentieth year of his reign, just when the general survey of England, called Domesday-book, is supposed to have been finished, and not till then, summoned all the great men and land-

arbitrary will and power of the Conqueror; but to have been gradually established by the Norman barons, and others, in such forfeited lands as they received from the gift of the Conqueror, and afterwards universally consented to by the great council of the nation long after his title was established. Indeed, from the prodigious slaughter of the English nobility at the battle of Hastings, and the fruitless insurrections of those who survived, such numerous forfeitures had accrued, that he was able to reward his Norman followers with very large and extensive possessions: which gave a handle to the monkish historians, and such as have implicitly followed them, to represent him as having by right of the sword seized on all the lands of England, and dealt them out again to his own favourites. A supposition, grounded upon a mistaken sense of the word *conquest*; which, in its feudal acceptation, signifies no more than *acquisition* (10); and this has led many hasty writers into a

Signification of
the word *con-*
quest.

holders in the kingdom to do their homage, and swear their fealty to him; by doing whereof the Saxon chronicler supposes, that, at that time, *proceres et omnes prædia tenentes se illi subdidere, ejusque facti sunt vassalli*. So that we may reasonably suppose, first, that this general homage and fealty was done at this time, (nineteen or twenty years after the accession of William I.,) in consequence of something new; or engagements so important to the maintenance and security of a new establishment would have been required long before; and if so, it is probable that *tenures* were then new, inasmuch as homage and fealty were mere feudal engagements, binding the homager to all the duties and observances of a feudal tenant. Secondly, that as this general homage and fealty was done about the time that Domesday-book was finished, and not before, we may suppose that that survey was taken upon, or soon after, our ancestors' consent to *tenures*, in order to discover every man's fee, and to fix his homage: this supposition is the more probable, because

it is not likely that a work of this nature was undertaken without some immediate reason, and no better reason can be assigned why it was undertaken at this time, or indeed why this survey should have been taken at all." And, in a note, it is added, if a particular survey of every estate had not been required for the purposes above mentioned, the general survey of the whole kingdom taken for Alfred, and which was extant in the time of William I., would have sufficed.

(10) It seems to have been a point of honour, with most writers of our nation, (those of undoubted Norman descent as well as others,) to maintain that William I. only made an *acquisition* of England, but that he by no means conquered it: and, to avoid the (fancied) disgrace of having the Saxons considered as beaten enemies, it is (gravely) asserted, they were only beaten rebels; though there is no denying that they were beaten by a foreign prince, at the head of a foreign army. Wright (L. of Ten. 61, 62) says, "though it is true that the possessions of the Normans were

strange historical mistake, and one which upon the slightest examination will be found to be most untrue. However,

of a sudden very great, and that they received most of them from the hands of William I., yet it does not follow, that this king took all the lands of England out of the hands of their several owners, claiming them as the spoils of war, or as parcel of a conquered country; but, on the contrary, it appears pretty plain from the history of those times, that the king either had, or pretended, title to the Crown, and that his title, whether real or pretended, was established by the defeat of Harold, which amounted to an unquestionable judgment in his favour. He did not therefore treat his opposers as enemies, but as traitors, agreeably to the known laws of the kingdom, which subjected traitors not only to loss of life, but of all their possessions; so that this king, thus entitling himself to the lands of all such as had, or did afterwards oppose him, might well reward his followers in the manner he did."

From these premises (if admitted) the logical deduction must be, that, if a foreigner pretends to have title to the crown of another kingdom, and by force of foreign arms defeats the native troops, and kills the native prince of that country, the crown of which he places on his own head, and the greater part of the lands in which he takes from the native proprietors, and distributes among his own foreign troops, such a military *acquisition* is not a conquest; and if he pretends that his beaten opponents were not enemies, but merely rebels, when such opponents have been defeated or subdued, it is a strange mistake to say they have been conquered. Nice distinctions these! but they would hardly save the national honour, if, at the present day, that were at all staked upon the question.

The controversy, as Hume has observed, can hardly fail to degenerate into a dispute about words. It is admitted that the word conquest is sometimes, in old books, used to denote a peaceable acquisition; and therefore it must also be allowed, that the title of conqueror did not, in the 11th century, necessarily and of itself, imply that the prince to whom it was universally assigned owed his crown solely to force of arms. To determine whether the appellation was, or was not, properly applied in that sense to William I, it is necessary to consider the circumstances under which he mounted the throne. These circumstances will be best stated in the felicitous language of Hume. In the 4th chapter of his History, he says, "The Duke of Normandy's first invasion of the island was hostile; his subsequent administration was entirely supported by arms; in the very frame of his laws he made a distinction between the Normans and English, to the advantage of the former; he acted in every thing as absolute master over the natives, whose interest and affections he totally disregarded; and if there was an interval when he assumed the appearance of a legal sovereign, the period was very short, and was nothing but a temporary sacrifice, which he, as has been the case with most conquerors, was obliged to make, of his inclinations to present policy. Scarce any of those revolutions which, both in history and in common language, have always been denominated conquests, appear equally violent, or were attended with so sudden an alteration both of power and property. The Normans and other foreigners, who followed the standard of William, having totally subdued the natives, pushed the right of conquest to the

certain it is, that *the Normans now began to gain very large possessions in England; and their regard for the feodal law

utmost extremity against them. Except the former conquest of England by the Saxons themselves, who were induced, by peculiar circumstances, to proceed even to the extermination of the natives, it would be difficult to find in all history a revolution more destructive, or attended with a more complete subjection of the inhabitants. Contumely seems to have been wantonly added to oppression, and the natives were universally reduced to such a state of meanness and poverty, that the English name became a term of reproach, and several generations elapsed before one family of Saxon pedigree was raised to any considerable honours."

If these facts do not denote a conquest, in the ordinary sense of that word, then, to be sure, it will be difficult to prove that the Saxons were a conquered people.

But many writers contend, that, however despotic William I. may have been after he became king, he at first obtained his crown by the election of the natives: and it is very true, that, at the ceremony of his coronation, when he was surrounded by his victorious army, the by-standers were graciously asked if they chose to have William for their king; to which question, it may be safely assumed, no loud negative was given. It seems, however, that the Saxon populace were a little more noisy in their expression of assent, than their conquerors thought decorous in persons who had been so lately beaten, and they were immediately chastised with no little severity. If, after reading an account of the transaction in any of our historians, no matter which of them, any one is still of opinion that William I. owed his crown to a free election of the natives; it would be

idle to attempt, by argument, to shake such an individual's conviction.

Really, after we have been all amalgamated into one nation for eight centuries, the man who bears the most genuine Saxon name must be peculiarly sensitive, if he feels his honour concerned to disprove the allegation that the descendants of those ferocious and successful pirates, who, in the fifth century, seized on this country by force of arms, and ravaged it with atrocious cruelty, were, in the 11th century, compelled, in their turn, to disgorge their plunder by another band, of equally predatory habits, but of more polished and chivalrous manners, and who conducted their pillage in a less blood-thirsty and exterminating manner than their precursors (whom they were stripping) had done.

Any apprehension that the present rights and privileges of the people of this country can be affected by a transaction which took place 800 years ago, is, as Hume remarks, perfectly idle: it is not necessary to strain the meaning of words, or distort the true character of facts, in support of those rights and privileges which, happily, rest upon much more secure foundations. But our author (notwithstanding what he says in the text above) himself informs us in the last chapter of his fourth volume, that "the restitution of English liberty, for the first time since its total abolition at the conquest, is to be dated after the restoration of Charles II., when not only slavish tenures, *the badge of foreign dominion*, with all their oppressive appendages, were removed from incumbering the estates of the subject; but also an additional security of his person from imprisonment was obtained, by that great bulwark of our constitution, the *habeas corpus*

under which they had long lived, together with the king's recommendation of this policy to the English, as the best way to put themselves on a military footing, and thereby to prevent any future attempts from the continent, were probably the reasons that prevailed to effect its establishment here by law. And, though the time of this great revolution in our landed property cannot be ascertained with exactness, yet there are some circumstances that may lead us to a probable conjecture concerning it. For we learn from the Saxon Chronicle (*q*), that in the nineteenth year of King William's reign an invasion was apprehended from Denmark; and the military constitution of the Saxons being then laid aside, and no other introduced in its stead, the kingdom was wholly defenceless: which occasioned the king to bring over a large army of Normans and Bretons, who were quartered upon every landholder, and greatly oppressed the people. This apparent weakness, together with the grievances occasioned by a foreign force, might co-operate with the king's remonstrances, and the better incline the nobility to listen to his proposals for putting them in a posture of defence. For, as soon as the danger was over, the king held a great council to inquire into the state of the nation (*r*); the immediate consequence of which was the compiling of the great survey called domesday-book, which was finished in the next year: and in the latter end of that very year the king was attended by all his nobility at Sarum; where all the principal landholders submitted their lands to the yoke of military tenure, became the king's vassals, and did homage and fealty to his person (*s*). This may

The compilation of domesday-book, and the submission of the principal landholders to military tenure.

(*q*) A. D. 1085.

(*r*) *Rex tenuit magnum concilium, et graves sermones habuit cum suis proceribus de hac terra; quo modo incoleretur, et a quibus hominibus.* Chron. Sax. *ibid*.

(*s*) *Omnes prædia tenentes, quotquot*

essent notæ melioris per totam Angliam, ejus homines facti sunt, et omnes se illi subdidere, ejusque facti sunt vasalli, ac ei fidelitatis juramenta præstiterunt, se contra alios quoscunque illi fidos futuros. Chron. Sax. A. D. 1086.

act." And, in Vol. III. p. 317, Blackstone says, the use of Norman French in all public proceedings was "an evident and shameful badge of tyranny and foreign servitude." (See, however, Barrington's Obs. p. 34,

and 1 Palgrave, Rise & Prog. of Eng. Comm. p. 56, which make it very doubtful whether our laws were in the French language, before the reign of Henry II.)

possibly have been the æra of formally introducing the feudal tenures by law (11); and perhaps the very law, thus made at the council of Sarum, is that which is still extant (t), *and couched in these remarkable words: "*statuimus, ut omnes liberi homines fœdere et sacramento affirment, quod intra et extra universum regnum Angliæ Wilhelmo regi domino suo fideles esse volunt; terras et honores illius omni fidelitate ubique servare cum eo, et contra inimicos et alienigenas defendere.*" The terms of this law (as Sir Martin Wright has observed (u) are plainly feudal: for, first, it requires the oath of fealty, which made in the sense of the feudists every man that took it a tenant or vassal: and, secondly, the tenants obliged themselves to defend their lord's territories and titles against all enemies foreign and domestic. But what clearly evinces the legal establishment of this system, is another law of the same collection (w), which exacts the performance of the military feudal services, as ordained by the general council. "*Omnes comites, et barones, et milites, et servientes, et universi liberi homines totius regni nostri prædicti, habeant et teneant se semper bene in armis et in equis, ut decet et oportet: et sint semper prompti et bene parati, ad servitium suum integrum nobis explendum et peragendum, cum opus fuerit; secundum quod nobis debent de fœdis et tenementis suis de jure facere, et sicut illis statuimus per commune concilium totius regni nostri prædicti.*"

[* 50]
The nature of the oath of fealty.

This new polity therefore seems not to have been imposed by the conqueror, but nationally and freely adopted by the general assembly of the whole realm, in the same manner as other nations of Europe had before adopted it, upon the same principle of self-security (12). And, in particular,

The national and free adoption of the feudal system by the general assembly of the realm.

(t) Cap. 52. Wilk. 228.

(w) Cap. 58. Wilk. 228.

(u) Tenures, 66.

(11) See *ante*, note (9) to p. 48.

(12) See *ante*, note (7) to p. 47. It will be seen, however, in the course of the two next pages of the text, that our author (notwithstanding he supposes, in the passage above, that the new polity of feuds was freely adopted by the general assembly of the whole realm, not im-

posed by the conqueror), thinks it probable, our English ancestors, by consenting to the introduction of feudal tenures, meant no more than to put the kingdom in a state of defence; but that they were taken in by the art and finesse of the Norman lawyers, who, by their technical construction of the proceeding, intro-

[* 51]

Consequences
of its adoption.

they had the recent example of the French nation before their eyes; which had gradually surrendered up all its allodial or free lands into the king's hands, who restored them to the owners as a *beneficium* or feud, to be held to them and such of their heirs as they previously nominated to the king: and thus by degrees all the allodial estates in France were converted into feuds, and the freemen became the vassals of the crown (*x*). The only difference between this change of tenures in France, and that in England, was, that the former was effected gradually, *by the consent of private persons; the latter was done at once, all over England, by the common consent of the nation (*y*).

In consequence of this change, it became a fundamental maxim and necessary principle (though in reality a mere fiction) of our English tenures, "that the king is the universal lord and original proprietor of all the lands in his kingdom (*z*): and that no man doth or can possess any part of it, but what has mediately or immediately been derived as a gift from him, to be held upon feudal services" (13). For this being the real case in pure, original, proper feuds, other nations who adopted this system

(*x*) Montesq. Sp. L. b. 31, c. 8.

part of their value. (Gen. ch. xlvii.)

(*y*) Pharaoh thus acquired the dominion of all the lands in Egypt, and granted them out to the Egyptians, reserving an annual render of the fifth

(*z*) *Tout fuit in luy, et vient de luy al commencement.* (M. 24 Edw. III. 65.)

duced such hardships and services as were never known to other countries. (See *post*, the note to p. 63.)

According to this supposition, the conquest was completed by the Norman lawyers, rather than by the Norman soldiers; but, in either case, the Saxon servitude is admitted.

(13) See Co. Litt. 65 a, in his note upon which Mr. Hargrave observes, "according to this position (namely, that all land is holden by feudal service) of which the truth is undeniable, all the lands in England, except those in the king's hands, are feudal. This universality of tenures, if not quite peculiar to England, certainly doth not prevail in several countries on the

continent of Europe, where the feudal system has been established. In Germany, Holland, and France, nay even in the province of Normandy, there are still allodial lands to be found; and, it seems, there are some few portions of allodial land yet in Scotland." The Saxons, then, either thought it most safe to consent to, or they had imposed upon them, a more universal system of tenures than their Norman conquerors thought necessary in their own country. If this was at first thought a boon, by the Saxons, it will appear, by our author's statement, that they soon grew weary of it.

were obliged to act upon the same supposition, as a substruction and foundation of their new polity, though the fact was indeed far otherwise. And indeed, by thus consenting to the introduction of feodal tenures, our English ancestors probably meant no more than to put the kingdom in a state of defence by establishing a military system: and to oblige themselves (in respect of their lands) to maintain the king's title and territories, with equal vigour and fealty, *as if* they had received their lands from his bounty upon these express conditions, as pure, proper, beneficiary feudatories. But whatever their meaning was, the Norman interpreters, skilled in all the niceties of the feodal constitutions, and well understanding the import and extent of the feodal terms, gave a very different construction to this proceeding: and thereupon took a handle to introduce, not only the rigorous doctrines which prevailed in the duchy of Normandy, but also such fruits and dependencies, such hardships and services, as were never known to other nations (*a*); as if the English had, in fact as well as theory, owed every thing they had to the bounty of their sovereign lord.

Grievances
which its intro-
duction into
England occa-
sioned,

Our ancestors therefore, who were by no means beneficiaries, but had barely consented to this fiction of tenure from *the crown, as the basis of a military discipline, with reason looked upon these deductions as grievous impositions, and arbitrary conclusions from principles that, as to them, had no foundation in truth (*b*). However, this king, and his son William Rufus, kept up with a high hand all the rigours of the feodal doctrines: but their successor, Henry I., found it expedient, when he set up his pretensions to the crown, to promise a restitution of the laws of King Edward the confessor, or ancient Saxon system; and accordingly, in the first year of his reign, granted a charter (*c*), whereby he gave up the greater grievances, but still reserved the fiction of feodal tenure, for the same military purposes which engaged his father to introduce it. But this charter was gradually broken through, and the former grievances were revived and aggravated, by himself and succeeding princes; till, in the reign of King John, they became so intolerable, that they occasioned his barons, or principal feudatories, to rise up in arms against him; which at length produced the famous

[* 52]

(*a*) Spelm. of Feuds, c. 28.

(*b*) Wright, 81.

(*c*) LL. Hen. I. c. 1.

caused the insurrection of the barons, which produced *Magna Charta*.

great charter of Runingmead, which, with some alterations, was confirmed by his son Henry III. And, though its immunities (especially as altered on its last edition by his son) (*d*) are very greatly short of those granted by Henry I., it was justly esteemed at the time a vast acquisition to English liberty. Indeed, by the farther alteration of tenures that has since happened (14), many of these immunities may now appear, to a common observer, of much less consequence than they really were when granted: but this properly considered, will show, not that the acquisitions under John were small, but that those under Charles were greater. And from hence also arises another inference; that the liberties of Englishmen are not (as some arbitrary writers would represent them) mere infringements of the king's prerogative, extorted from our princes by taking advantage of their weakness; but a restoration of that ancient constitution, of which our ancestors had been defrauded by the art and finesse of the Norman lawyers, rather than deprived by the force of the Norman arms (15).

Nature of feuds.

[* 53]

*Having given this short history of their rise and progress, we will next consider the nature, doctrine, and principal laws of feuds; wherein we shall evidently trace the ground-work of many parts of our public polity, and also the original of such of our own tenures, as were either abolished in the last century (16), or still remain in force.

Fundamental maxim of feodal tenure, what.

The grand and fundamental maxim of all feodal tenure is this: that all lands were originally granted out by the sovereign, and are therefore holden either mediately or immediately of the crown. The grantor was called the proprietor, or *lord*: being he who retained the dominion or ultimate property of the feud or fee; and the grantee, who had only the use and possession according to the terms of

Grantor called *lord*;

Grantee, *vassal*.

the grant, was stiled the feudatory or *vassal*, which was

(*d*) 9 Hen. III.

(14) By the statute of 12 Cha. II. c. 24, taking away the court of wards and liveries, all tenures by knights-service, or by socage *in capite* of the king, and all charges incident thereto; and turning all tenures into free and

common socage. But see *post*, the note to ch. 5, p. 77, as to the inaccuracy of this statute in professing to take away tenures by socage *in capite*.

(15) See *ante*, note (10) to p. 48.

(16) A. D. 1660.

only another name for the tenant or holder of the lands : though, on account of the prejudices which we have justly conceived against the doctrines that were afterwards *grafted* on this system, we now use the word *vassal* opprobriously, as synonymous to slave or bondman (17). The manner of the grant was by words of gratuitous and pure donation, *dedi et concessi* ; which are still the operative words in our modern infeodations or deeds of feoffment. This was perfected by the ceremony of corporal investiture, or open and notorious delivery of possession in the presence of the other vassals ; which perpetuated among them the æra of the new acquisition, at a time when the art of writing was very little known ; and therefore the evidence of property was reposed in the memory of the neighbourhood ; who, in case of a disputed title, were afterwards called upon to decide the difference, not only according to external proofs, adduced by the parties litigant, but also by the internal testimony of their own private knowledge.

Besides (18) an oath of *fealty*, or profession of faith to

(17) Mr. Christian, in his note on this passage, says, “ Nothing, I think, proves more strongly the detestation in which the people of this country held the feudal oppressions, than that the word *vassal*, which once signified a feudal tenant or grantee of land, is now synonymous to slave ; and that the word *villain*, which once meant only an innocent inoffensive bondman, has kept its relative distance, and denotes a person destitute of every moral and honourable principle, and is become one of the most opprobrious terms in the English language.” [And see to the same purport, the note to p. 78, of Wright’s *L. of Ten.*, which Blackstone, it is not improbable, had in his recollection when he penned the passage in the text. Our author, however, appears not to be very clear that the word *villain* did not always convey an intimation that the person to whom it was applied was *vile*. See p. 92 of this volume.—ED.]

(18) See *ante*, p. 45, note (4) to

this chapter, observing, in addition to what is there said, that lands held in *frank-almoigne* ; or at will, according to common law, not affected by custom ; form exceptions to the general rule, that fealty is incident to all manner of tenures. (1 Inst. 93 a, b ; *post*, p. 101.) It should also be remarked, that no one who had not an estate in fee simple or fee tail, either in his own right or in right of another, was entitled either to receive, or even to do, homage. (1 Inst. 66 b, 67 a.) Homage, indeed, seems to have been properly incident to tenure by knight’s service only ; at least, wherever homage was parcel of a tenure, that was held to afford a presumption that the tenure was by knight’s service, unless the contrary could be proved. (1 Inst. 67 b.) Whilst homage continued, it was far from being a mere ceremony, for the performance of it, where it was due, materially concerned both lord and tenant in point of interest and advantage. To the lord it was of con-

homage.

[* 54]

Services due to
the lord—

in peace,

the lord, which was the parent of our oath of allegiance (19), the vassal or tenant upon investiture did usually *homage* to his lord; openly and humbly kneeling, being ungirt, uncovered, *and holding up his hands both together between those of the lord, who sate before him; and there professing, that “he did become his *man*, from that day forth, of “life and limb and earthly honour:” and then he received a kiss from his lord (e). Which ceremony was denominated *homagium*, or *manhood*, by the feudists, from the stated form of words *devenio vester homo* (f).

When the tenant had thus professed himself to be the man of his superior or lord, the next consideration was concerning the *service*, which, as such, he was bound to render, in recompense for the land that he held. This, in pure, proper, and original feuds, was only two-fold; to follow, or do (20) *suit* to, the lord in his courts in time of peace; and in his armies or warlike retinue, when necessity called him to the field. The lord was, in early times, the legislator and judge over all his feudatories: and therefore the vassals of the inferior lords were bound by their fealty to attend their domestic courts baron (g) (which were instituted in every manor or barony, for doing speedy and effectual justice to all the tenants,) in order, as well to answer such complaints

(e) Lit. s. 85.

(f) It was an observation of Dr. Arbuthnot, that tradition was no where preserved so pure and incorrupt as among children, whose games and plays are delivered down invariably from one generation to another. (Warburton's notes on Pope, vi. 134, 8vo.) It will not, I hope, be thought puerile

to remark, in confirmation of this observation, that in one of our ancient juvenile pastimes (the *king I am* or *basilinda* of Julius Pollux, *Onomastic*. l. 9, c. 7,) the ceremonies and language of feudal homage are preserved with great exactness.

(g) Feud. l. 2, t. 55. [*Post*, p. 90, 365; Vol. III. p. 33.]

sequence, because, till he had received homage from the heir, he was not entitled to the wardship of him and of his land; unless the lord had the seignory for life or years only, in which case he could not take homage, and therefore was allowed wardship without that previous act. To the tenants the homage was scarce of less importance; for, anciently, *every* kind of homage, when received, but not be-

fore, bound the lord to keep the tenant free from every molestation for services due to the lord paramount, (if there were any such,) and to defend his title to the land against all others; though in subsequent times this implication of acquittal and warranty became peculiar to homage *auncestrel*. (Hargrave's note to Co. Litt. 67 b.)

(19) See Vol. I. p. 367.

(20) See Vol. III. p. 230.

as might be alleged against themselves, as to form a jury or homage for the trial of their fellow-tenants ; and upon this account, in all the feudal institutions, both here and on the continent, they are distinguished by the appellation of the peers of the court ; *pares curtis*, or *pares curiæ* (21). In like manner the barons themselves, or lords of inferior districts, were denominated peers of the king's court, and were bound to attend him upon summons, to hear causes of greater consequence in the king's presence, and under the direction of his grand justiciary ; till, in many countries, the power of that officer was broken and distributed into other courts of judicature, the peers of the king's court still reserving to themselves (in *almost every feudal government) the right of appeal from those subordinate courts in the last resort. [* 55]

The military branch of service consisted in attending the lord to the wars, if called upon, with such a retinue, and for such a number of days as were stipulated at the first donation, in proportion to the quantity of the land. in war.

(21) Upon the investiture of any tenant, the presence of the *pares curiæ* was required equally for the advantage of the lord, of the tenant, and of themselves ; of the lord, that, if the tenant was a secret enemy, or otherwise unqualified, he might be apprised thereof by the peers of his court, before he admitted him ; and that they might be witnesses of the obligation the tenant had laid himself under of doing service, and of the conditions annexed to the gift, if any there were, which the law did not imply ; for the benefit of the tenant, that they might testify the grant of the lord, and for what services it was given ;—and lastly, for their own advantage, that they might know what the land was, that it was open for their lord to give, and not the property of any of the vassals ; and also that no improper person should be admitted a *par*, or peer of their court, and consequently be a witness, or judge, in their causes. And the practice of completing investiture by delivery of seisin on the lands, in presence of the *pares curiæ*,

was for the benefit of the co-vassals (who could better judge by their own eyes on the spot, whether an injury was done by the grant to any of them, than by hearing the lands named and described elsewhere,) as well as for the sake of the tenant, who, if the investiture was subsequently denied, might establish his right by producing two or more of the *pares curiæ*, each of whom could swear that he had either been present at the investiture himself, or had constantly heard his father declare that he was so. This sort of evidence afforded abundantly sufficient security to the tenant, so long as the grants were only for one life ; but when grants of inheritance became usual, some more permanent evidence became necessary, and this gave rise to *brevia testata*, or, as we now call them, deeds, which were written instruments, expressing the grant and its nature, attested by some of the *pares*, and authenticated by the seal of the lord, or by his name and sign of the cross. (Sullivan's 6th Lect. on L. of Eng.)

Feuds were at first held at the will of the lord ;

afterwards, for one or more years ;

then for life ;

Infants, women, and monks, incapable of succeeding to a feud.

[* 56]

(Relief, what.)

At the first introduction of feuds, as they were gratuitous, so also they were precarious, and held at the *will* of the lord (*h*), who was then the sole judge whether his vassal performed his services faithfully. Then they became certain for one or more *years*. Among the ancient Germans they continued only from year to year ; an annual distribution of lands being made by their leaders in their general councils or assemblies (*i*). This was professedly done, lest their thoughts should be diverted from war to agriculture, lest the strong should encroach upon the possessions of the weak, and lest luxury and avarice should be encouraged by the erection of permanent houses, and too curious an attention to convenience and the elegant superfluities of life. But, when the general migration was pretty well over, and a peaceable possession of the new-acquired settlements had introduced new customs and manners ; when the fertility of the soil had encouraged the study of husbandry, and an affection for the spots they had cultivated began naturally to arise in the tillers ; a more permanent degree of property was introduced, and feuds began now to be granted for the *life* of the feudatory (*k*). But still feuds were not yet *hereditary*, though frequently granted, by the favour of the lord, to the children of the former possessor ; till in process of time it became unusual, and was therefore thought hard, to reject the heir, if he were capable to perform the services (*l*): and therefore infants, women, and professed monks, who were incapable of bearing arms, were also incapable of succeeding to a genuine feud. But the heir, when admitted to the feud which his ancestor possessed, used generally to pay a fine or acknowledgment to the lord, in horses, arms, money, and the like, for such renewal of the feud : which was called a relief, because it raised up and re-established the inheritance ; or, in the words of the feudal writers, "*incertam et caducam hereditatem releva-*

(*h*) Feud. l. 1, t. 1.

(*i*) Thus Tacitus : (*de Mor. Germ.* c. 26) "*agri ab universis per vices occupantur : arva per annos mutant.*" And Cæsar yet more fully, (*de Bell. Gall.* l. 6, c. 21) "*Neque quisquam agri modum certum, aut fines proprios habet ; sed magistratus et*

"*principes, in annos singulos, gentibus et cognationibus hominum qui una coierunt, quantum eis et quo loco visum est, attribuunt agri, atque anno post alio transire cogunt.*"

(*k*) Feud. l. 1, t. 1.

(*l*) Wright, 14.

bat." This relief was afterwards, when feuds became absolutely hereditary, continued on the death of the tenant, though the original foundation of it had ceased.

For, in process of time, feuds came by degrees to be universally extended beyond the life of the first vassal, to his *sons*, or perhaps to such one of them as the lord should name; and in this case the form of the donation was strictly observed: for if a feud was given to a man and his *sons*, all his sons succeeded him in equal portions: and, as they died off, their shares reverted to the lord (22), and did not descend to their children, or even to their surviving brothers, as not being specified in the donation (*m*). But when such a feud was given to a man and his *heirs*, in general terms, then a more extended rule of succession took place; and when the feudatory died, his male descendants *in infinitum* were admitted to the succession. When any such descendant, who thus had succeeded, died, his male descendants were also admitted in the first place; and, in defect of them, such of his male collateral kindred as were of the blood or lineage of the first feudatory, but no others. For this was an unalterable maxim in feudal succession, that "none was capable of inheriting a feud, but such as was of the blood of, that is, lineally descended from, the first feudatory" (*n*) (23). And the descent, being thus confined to males, originally extended to all the males alike; all the sons, without any distinction of primogeniture, succeeding to equal portions of the father's feud. But this being found, upon many accounts, inconvenient, (particularly, by dividing the services, and thereby weakening the strength of the feudal union,) and *honorary* feuds (or titles of nobility) being now introduced, which were not of a divisible nature, but could only be inherited by the eldest son (*o*): in imitation of these *military* feuds (or those we are now describing) began also in most countries to descend,

In process of time feuds became descendible to the sons of the feudatory.

Lineal descendants of the first feudatory alone entitled.

The descent originally extended to all the sons equally;

but the inconvenience of this occasioned the adoption of the right of primogeniture.

[* 57]

(*m*) Wright, 17.

(*n*) Ibid. 183.

(*o*) Feud. 2, t. 55.

(22) Craig (*de Jure Feudali*, lib. 1, diegesis 9, s. 33,) following Baldus, says, "*feudum ex sua natura est species quædam donationis, et æquum est ut donationes omnes sint stricti juris, ne*

quis plus donasse præsumatur, quam in donatione expresserit."

(23) See this doctrine fully discussed, *post*, in chap. 14 of this volume, pp. 220, *et seq.* and the notes thereto.

according to the same rule of primogeniture, to the eldest son, in exclusion of all the rest (*p*).

The feudatory could not dispose of his feud without the consent of the lord.

Other qualities of feuds were, that the feudatory could not aliene or dispose of his feud ; neither could he exchange, nor yet mortgage, nor even devise it by will, without the consent of the lord (*q*). For, the reason of conferring the feud being the personal abilities of the feudatory to serve in war, it was not fit he should be at liberty to transfer this gift, either from himself, or from his posterity, who were presumed to inherit his valour, to others who might prove less able (24). And, as the feudal obligation was looked upon as reciprocal, the feudatory being entitled to the lord's protection, in return for his own fealty and service ; therefore the lord could no more transfer his seignory or protection without consent of his vassal, than the vassal could his feud without consent of his lord (*r*) : it being equally unreasonable, that the lord should extend his protection to a person to whom he had exceptions, and that the vassal should owe subjection to a superior not of his own choosing.

Neither could the lord transfer his seignory without the consent of the vassal.

Vassals had, in like manner, their inferior tenants bound to them by the like obligations.

These were the principal, and very simple, qualities of the genuine or original feuds ; which were all of a military nature, and in the hands of military persons ; though the feudatories, being under frequent incapacities of cultivating and manuring their own lands, soon found it necessary to commit part of them to inferior tenants : obliging them to such returns in *service*, corn, cattle, or money, as might enable the chief feudatories to attend their military duties without distraction : which returns, or *reditus*, were the original of *rents* (25), and by these means the feudal polity was greatly extended ; these inferior feudatories (who held what are called in the Scots law "rere-fiefs") being under similar obligations of *fealty*, to do suit of court, to answer the stipulated renders or rent-service, and to promote the welfare of their immediate superiors or lords (*s*). *But this at the same time demolished the ancient simplicity of feuds ; and an inroad being once made upon their constitution, it

[* 58]

(*p*) Wright, 32.

(*q*) Ibid. 29.

(*r*) Wright, 30.

(*s*) Ibid. 20.

(24) See *ante*, p. 47 ; *post*, p. 287.

(25) Vol. III. p. 230.

subjected them, in a course of time, to great varieties and innovations. Feuds began to be bought and sold, and deviations were made from the old fundamental rules of tenure and succession; which were held no longer sacred when the feuds themselves no longer continued to be purely military. Hence these tenures began now to be divided into *feoda propria et impropria*, proper and improper feuds; under the former of which divisions were comprehended such, and such only, of which we have before spoken; and under that of improper or derivative feuds were comprised all such as do not fall within the other descriptions; such, for instance, as were originally bartered and sold to the feudatory for a price; such as were held upon base or less honourable services, or upon a rent, in lieu of military service; such as were in themselves alienable, without mutual license; and such as might descend indifferently either to males or females. But, where a difference was not expressed in the creation, such new-created feuds did in all respects follow the nature of an original, genuine, and proper feud (*t*). Change in the nature of feuds.

But, as soon as the feudal system came to be considered in the light of a civil establishment, rather than as a military plan, the ingenuity of the same ages, which perplexed all theology with the subtilty of scholastic disquisitions, and bewildered philosophy in the mazes of metaphysical jargon, began also to exert its influence on this copious and fruitful subject; in pursuance of which, the most refined and oppressive consequences were drawn from what originally was a plan of simplicity and liberty, equally beneficial to both lord and tenant, and prudently calculated for their mutual protection and defence. From this one foundation, in different countries of Europe, very different superstructures have been raised; what effect it has produced on the landed property of England will appear in the following chapters. Oppressive consequences drawn from the feudal system.

(*t*) Feud. 2, t. 7.

CHAPTER V.

OF THE ANCIENT ENGLISH TENURES.

Of the ancient
English tenures.

IN this chapter we shall take a short view of the ancient tenures of our English estates, or the manner in which lands, tenements, and hereditaments, might have been holden, as the same stood in force, till the middle of the last century. In which we shall easily perceive, that all the particularities, all the seeming and real hardships, that attended those tenures, were to be accounted for upon feudal principles, and no other; being fruits of, and deduced from, the feudal policy.

All lands supposed to be
holden of some
superior lord.

Almost all the real property of this kingdom is, by the policy of our laws, supposed to be granted by, dependent upon, and *holden* of, some superior lord (1), by and in consideration of certain services to be rendered to the lord by the tenant or possessor of this property. The thing holden is therefore stiled a *tenement* (2), the possessors thereof *tenants*, and the manner of their possession a *tenure*. Thus all the land in the kingdom is supposed to be holden, mediately or immediately, of the king, who is stiled the lord *paramount*, or above all. Such tenants as held under the king immediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as they were still tenants with respect to the king: and, thus partaking of a middle nature, were called *mesne*, or middle, lords. So that if the king granted a manor to A., and he granted a portion of the land

The king, lord
paramount;

his grantees,
mesne lords.

(1) See the last chapter, p. 51, and the note thereto.

(2) See *ante*, chap. 2, p. 17, and the two first notes thereto.

to B., now B. was said to hold *of A., and A. of the king; or, in other words, B. held his lands immediately of A., but mediately of the king. The king therefore was stiled lord paramount; A. was both tenant and lord, or was a mesne lord: and B. was called tenant *paravail*, or the lowest tenant; being he who was supposed to make avail or profit of the land (a). In this manner are all the lands of the kingdom holden, which are in the hands of subjects: for, according to Sir Edward Coke (b), in the law of England we have not properly *allodium*; which, we have seen (c), is the name by which the feudists abroad distinguish such estates of the subject, as are not holden of any superior. So that at the first glance we may observe, that our lands are either plainly feuds, or partake very strongly of the feudal nature (3).

Tenants *paravail*.

(a) 2 Inst. 296.

(b) 1 Inst. 1.

(c) Page 47.

(3) "It is to the conquest, and to the consequences of that revolution, that the juridical historian is to direct his particular attention. A new order of things then commenced. The nature of landed property was entirely changed; the whole constitution was altered; and, after fluctuating on a singular policy, pregnant with the most opposite consequences of freedom and slavery, by degrees settled into peace and orderly government. In short, a state of things then took place, from which, after innumerable alterations, arose the present frame of English jurisprudence.... The doctrine of tenures being once established, all the foreign learning concerning them of course followed. The Norman rules of property and methods of proceeding soon began to prevail, and gradually became a part of the common law of England.... A new system, deduced as a necessary consequence from the establishment of feudal tenures, sprung up, by which the landed property of the kingdom was entirely governed till the middle of the 17th century, and is, in some degree, influenced even at this day....

By the operation of the statutes of William I. (cc. 52 & 58) the Saxon distinctions as to the different qualities of estates in lands, with all their several incidents, were totally abolished; and all the *liberi homines* of the kingdom, on a sudden, became possessed of their lands under a tenure which bound them, in a feudal light, mediately or immediately to the king." (Reeves's Hist. of Engl. Law, ch. 2.)

Craig (in his *Jus Feud.* lib. 1, dieges. 9, s. 5) adopts the definition of a feud proposed by Zasius, and approved by the most eminent feudal jurists, which definition is as follows: *Est feudum beneficium, seu benevola et libera rei immobilis aut æquipollentis concessio, cum utilis dominii translatione, retentâ proprietate, seu dominio directo, sub fidelitate et exhibitione servitiorum honestorum.* It is evident, however, that this definition is applicable to such feuds only as were given without price, or stipulation, except for the faithful performance of military or other honourable services. But, the division of feuds into proper and improper ones, soon became general. Improper feuds, (as our au-

The king's immediate tenants called tenants *in capite*.

All tenures being thus derived, or supposed to be derived, from the king, those that held immediately under him, in right of his crown and dignity, were called his tenants *in capite*, or in chief; which was the most honourable species of tenure, but at the same time subjected the tenants to greater and more burthensome services, than inferior tenures did (*d*). This distinction ran through all the different sorts of tenure, of which I now proceed to give an account.

I. The principal species of lay tenures were four, and were distinguished by the nature of the services due in respect of them: which were—

free, or

[* 61]

base;

certain, or

uncertain.

I. There seem to have subsisted among our ancestors four principal species of lay tenures, to which all others may be reduced: the grand criteria of which were the natures of the several services or renders, that were due to the lords from their tenants. The services, in respect of their quality, were either *free* or *base* services; in respect of their quantity and the time of exacting them, were either *certain* or *uncertain*. *Free* services were such as were not unbecoming the character of a soldier or a freeman to perform; as to serve *under his lord in the wars, to pay a sum of money, and the like. *Base* services were such as were only fit for peasants or persons of a servile rank; as to plough the lord's land, to make his hedges, to carry out his dung, or other mean employments. The *certain* services, whether free or base, were such as were stinted in quantity, and could not be exceeded on any pretence; as, to pay a stated annual rent, or to plough such a field for three days. The *uncertain* depended upon unknown contingencies; as, to do military service in person, or pay an assessment in lieu of it, when called upon; or to wind a horn whenever the Scots

(*d*) In the Germanic constitution, the electors, the bishops, the secular princes, the imperial cities, &c. which hold directly from the emperor, are

called the *immediate* states of the empire; all other landholders being denominated *mediate* ones. Mod. Un. Hist. xlii. 61.

thor informed us in p. 58,) were those which did not in point of acquisition, or of services, strictly conform to the nature of the pure military feud: and the definition above stated obviously cannot include feuds which were sold or bartered for an equivalent, or in consideration of any rent or *certain* return, or of the performance of any

base services, or which were granted free from all services. The presumption of law, certainly, always was, that a feud was a proper one, unless the contrary appeared, which could only be proved by a reference to the original investiture. (See *ante*, notes to p. 54, and Wright's L. of Ten. 36, 37.)

invaded the realm, which are free services: or to do whatever the lord should command; which is a base or villein service.

From the various combinations of these services have arisen the four kinds of lay tenure which subsisted in England, till the middle of the last century; and three of which subsist to this day. Of these Bracton (who wrote under Henry the third) seems to give the clearest and most compendious account, of any author ancient or modern (e); of which the following is the outline or abstract (f). “Tenements are of two kinds, *frank-tenement* and *villénage*. “And, of frank-tenements, some are held freely in consideration of homage and *knight-service*; others in *free-socage*, “with the service of fealty only.” And again (g), “of villénages some are pure, and others privileged. He that holds “in *pure villénage* shall do whatsoever is commanded him, “and always be bound to an uncertain service. The other “kind of villénage is called *villein-socage*; and these villein-socmen do villein services, but such as are certain “and determined.” Of which the sense seems to be as follows: first, where the service was *free* but *uncertain*, as military service with homage, that tenure was called the tenure in *chivalry, *per servitium militare*, or by knight-
Bracton's account of tenures.
Tenure by knight-service.
[* 62]
Free socage.
Absolute villénage.

(e) l. 4, tr. 1, c. 28.

(f) *Tenementorum aliud liberum, aliud villénagium. Item, liberorum aliud tenetur libere pro homagio et servitio militari; aliud in libero socagio cum fidelitate tantum. s. 1.*

(g) *Villénagiorum aliud purum, aliud privilegiatum. Qui tenet in puro villénagio faciet quicquid ei praecep-*

tum fuerit, et semper tenebitur ad incerta. Aliud genus villénagii dicitur villanum socagium; et hujusmodi villani socmanni—villana faciunt servitia, sed certa et determinata. s. 5. [See this subject enlarged upon, and the distinctions between the several sorts of socage, and of villénage, explained, in the next chapter.—Ed.]

Privileged villenage, or villein-socage.

1. The first species of tenure was by knight-service.

Quantity and value of land necessary to constitute it.

Duties it imposed on the tenant.

[* 63]

to a *certainty*, this was still villenage, but distinguished from the other by the name of privileged villenage, *villengium privilegiatum*; or it might be still called socage (from the certainty of its services), but degraded by their *baseness* into the inferior title of *villanum socagium*, villein-socage.

I. The first, most universal, and esteemed the most honourable species of tenure, was that by knight-service, called in Latin *servitium militare*; and in law-French, *chivalry*, or *service de chivaler*, answering to the *fief d'haubert* of the Normans (*h*), which name is expressly given it by the *Mirroure* (*i*). This differed in very few points, as we shall presently see, from a pure and proper feud, being entirely military, and the general effect of the feudal establishment in England. To make a tenure by knight-service, a determinate quantity of land was necessary, which was called a knight's fee, *feodum militare*; the measure of which in 3 Edw. I. was estimated at twelve plough-lands (*k*), and its value (though it varied with the times (*l*)) in the reigns of Edward I. and Edward II. (*m*) was stated at 20*l.* *per annum*. And he who held this proportion of land (or a whole fee) by knight-service, was bound to attend his lord to the wars for forty days in every year, if called upon (*n*): which attendance was his *reditus* or return, his rent or service, for the land he claimed to hold. If he held only half a knight's fee, he was only bound to attend twenty days, and so in proportion (*o*). And there is reason to *apprehend, that this service was the whole that our ancestors meant to subject themselves to; the other fruits and consequences of this tenure being fraudulently superinduced, as the regular (though unforeseen) appendages of the feudal system (5).

(*h*) Spelm. Gloss. 219.

(*i*) C. 2, s. 27.

(*k*) Pasch. 3 Edw. I.; Co. Litt. 69.

(*l*) 2 Inst. 596.

(*m*) Stat. Westm. 1, c. 36; Stat.

de milit. 1 Edw. II.; Co. Litt. 69.

(*n*) See writs for this purpose in Memorand. Scacch. 36, prefixed to Maynard's Year-book Edw. II.

(*o*) Litt. s. 95.

(5) Our author (in pp. 48; 50) has assured us that the feudal polity was not *imposed* by the conqueror, but nationally and freely adopted by the general assembly of the whole realm,

upon the principle of self-security. Then, if the system was not imposed, but freely adopted upon principles of self-interest, it seems not very consistent to say, that the *regular* con-

This tenure of knight-service had all the marks of a strict and regular feud: it was granted by words of pure donation, *dedi et concessi* (*p*); was transferred by investiture or delivering corporal possession of the land, usually called livery of seisin; and was perfected by homage and fealty. It also drew after it these seven fruits and consequences, as inseparably incident to the tenure in chivalry, *viz.* aids, relief, primer seisin, wardship, marriage, fines for alienation, and escheat (6): all which I shall endeavour to explain, and to show to be of feudal original.

Nature and form of grant.

Consequences incident to this species of tenure.

1. Aids were originally mere benevolences granted by the tenant to his lord, in times of difficulty and distress (*q*); but in process of time they grew to be considered as a matter of right, and not of discretion. These aids were principally three: first, to ransom the lord's person, if taken prisoner; a necessary consequence of the feudal attachment and fidelity: insomuch that the neglect of doing it, whenever it was in the vassal's power, was by the strict rigour of the feudal law an absolute forfeiture of his estate (*r*). Secondly, to make the lord's eldest son a knight; a matter that was for-

1. Aids, benevolences granted by the tenant to the lord—

To ransom the lord's person;

To make his eldest son a knight:

(*p*) Co. Litt. 9.

(*q*) *Auxilia fiunt de gratia et non de jure,—cum dependeant ex gratia*

tenentium, et non ad voluntatem domini-norum. Bracton, l. 2, tr. 1, c. 16, s. 8.

(*r*) Feud. l. 2, t. 24.

sequences of that system were *fraudulently* superinduced. One of the parties to a contract may not have foreseen all its regular consequences; but though by the result he may find out that he has not made so good a bargain as he expected, still, if he was a free agent in the transaction, (and Blackstone contends the introduction of feudality was voluntary on the part of all the conqueror's subjects,) the miscalculator may lament his want of foresight, but will hardly be entitled to complain of having been defrauded.

(6) If the king had granted lands without reserving any particular service or tenure, or if he even declared by express words that his patentee should hold the lands granted *absque aliquo inde reddendo*; yet the law or established policy of the kingdom

would have created a tenure, and the patentee would (before the statute of 12 Cha. II. c. 24) have held of the king *in capite* by knight-service: for, as a tenure was necessary, and the tenure in such case uncertain, the law created such a tenure as was most agreeable to the policy and design of the general system of tenures, and such as came nearest to the nature of a proper feud. (Wright's Law of Ten. 138, 139; *Anthony Lowe's case*, 9 Rep. 123.)

Several of the burthens and consequences incident to tenure by knight's service, were also annexed, (though generally speaking, in a manner less oppressive,) to tenure in socage; as will be shown by our author in the next chapter.

To marry his
eldest daughter.

[* 64]

To which even
the monasteries
contributed.

Besides these,
the lords exact-
ed other aids ;

merly attended with great ceremony, pomp, and expense. This aid could not be demanded till the heir was fifteen years old, or capable of bearing arms (s): the intention of it being to breed up the eldest son and heir apparent (7) of the seignory, to deeds of arms and chivalry, for the better defence of the nation. Thirdly, to marry the lord's eldest daughter, by giving her a suitable portion: for daughters' portions were in those days extremely slender; few lords being able to save much out of *their income for this purpose; nor could they acquire money by other means, being wholly conversant in matters of arms; nor, by the nature of their tenure, could they charge their lands with this or any other incumbrances. From bearing their proportion to these aids no rank or profession was exempted: and therefore even the monasteries, till the time of their dissolution, contributed to the knighting of their founder's male heir (of whom their lands were holden,) and the marriage of his female descendants (t). And one cannot but observe in this particular the great resemblance which the lord and vassal of the feudal law bore to the patron and client of the Roman republic; between whom also there subsisted a mutual fealty, or engagement of defence and protection. For, with regard to the matter of aids, there were three which were usually raised by the client, viz. to marry the patron's daughter; to pay his debts; and to redeem his person from captivity (u).

But besides these ancient feudal aids, the tyranny of lords by degrees exacted more and more; as, aids to pay the lord's

(s) 2 Inst. 233.

(t) Philips's Life of Pole, I. 223.

(u) *Erat autem haec inter utrosque officiorum vicissitudo—ut clientes ad collocandas senatorum filias de suo*

conferrent; in aeris alieni dissolutionem gratuitam pecuniam erogarent; et ab hostibus in bello captos redimerent. Paul. Manutius *de Senatu Romano*, c. 1.

(7) If a man had issue two sons, and the eldest died without issue, the father, if surviving, was entitled to aid for the second son, for the statute (Westminst. 1st, c. 36) speaks not of the first-born son. But if aid had been received for the eldest son, it would not be due again for the second; for one aid only was due to one and

the same lord to make his eldest son a knight. And if the lord had issue two sons, and the eldest son had issue a daughter and died, the lord was not entitled to aid to make his second son a knight, the second son not being heir apparent to his father's fee. (2nd Instit. 233.)

debts, (probably in imitation of the Romans,) and aids to enable him to pay aids or reliefs to his superior lord; from which last indeed the king's tenants *in capite* were, from the nature of their tenure, excused, as they held immediately of the king, who had no superior. To prevent this abuse, King John's *magna charta* (*v*) ordained that no aids be taken by the king without consent of parliament, nor in anywise by inferior lords, save only the three ancient ones above mentioned. But this provision was omitted in Henry III.'s charter, and the same oppressions were continued till the 25 Edw. I., when the statute called *confirmatio chartarum* was enacted; which in this respect revived King John's charter, by ordaining that none but the ancient aids should be taken. But though the species of aids was thus restrained, yet the quantity of each aid remained arbitrary and uncertain. King John's charter indeed ordered, that all aids taken by inferior lords should be reasonable (*w*); and that the aids taken by the king of his tenants *in capite* should be settled by parliament (*x*). But they were never completely ascertained and adjusted till the statute Westm. 1, 3 Edw. I. c. 36, which fixed the aids of inferior lords at twenty shillings, or the supposed twentieth part of the annual value of every knight's fee, for making the eldest son a knight, or marrying the eldest daughter: and the same was done with regard to the king's tenants *in capite*, by stat. 25 Edw. III. c. 11. The other aid, for ransom of the lord's person, being not in its nature capable of any certainty, was therefore never ascertained.

But these exactions were restricted by *magna charta*.

And by 25 Edw. I.

[* 65]

And completely ascertained by the stat. Westm. 1.

And 25 Edw. III. c. 11.

2. Relief, *relevium*, was before mentioned as incident to every feudal tenure, by way of fine or composition with the lord for taking up the estate, which was lapsed or fallen in by the death of the last tenant. But though reliefs had their original while feuds were only life-estates, yet they continued after feuds became hereditary; and were therefore looked upon, very justly, as one of the greatest grievances of tenure: especially when, at the first, they were merely arbitrary and at the will of the lord; so that, if he pleased to demand an exorbitant relief, it was in effect to disinherit the heir (*y*). The English ill brooked this consequence of

2. *Reliefs*.—Fines payable to the lord on taking up the estate at the death of the last tenant.

(*v*) Cap. 12, 15.

(*w*) Ibid. 15.

(*x*) Ibid. 14.

(*y*) Wright, 99.

their new-adopted policy; and therefore William the conqueror, by his laws (*z*) *ascertained* the relief, by directing (in imitation of the Danish heriots) that a certain quantity of arms, and habiliments of war, should be paid by the earls, barons, and vavasours respectively; and if the latter had no arms, they should pay 100s. William Rufus broke through this composition, and again demanded arbitrary uncertain reliefs, as due by the feudal laws: thereby in effect obliging every heir to new-purchase or *redeem* his land (*a*): but his brother Henry I., by the charter before mentioned, restored his father's law; *and ordained, that the relief to be paid should be according to the law so established, and not an arbitrary redemption (*b*). But afterwards, when, by an ordinance in 27 Hen. II. called the assize of arms, it was provided that every man's armour should descend to his heir, for defence of the realm; and it thereby became impracticable to pay these acknowledgments in arms according to the laws of the conqueror, the composition was universally accepted of 100s. for every knight's fee; as we find it ever after established (*c*). But it must be remembered, that this relief was only then payable, if the heir at the death of his ancestor had attained his full age of one and twenty years.

[* 66]

Assize of arms.

Composition in lieu of knight's fee,

payable only if the heir had attained twenty-one.

3. *Primer seisin*.—The right of the king, on the death of a tenant *in capite* seised of a knight's fee, to take certain profits.

3. *Primer seisin* was a feudal burthen, only incident to the king's tenants *in capite*, and not to those who held of inferior or mesne lords. It was a right which the king had, when any of his tenants *in capite* died seised of a knight's fee, to receive of the heir (provided he were of full age) one whole year's profits of the lands if they were in immediate possession: and half a year's profits, if the lands were in reversion expectant on an estate for life (*d*). This seems to be little more than an additional relief, but grounded upon this feudal reason; that, by the ancient law of feuds, immediately upon the death of a vassal, the superior was entitled to enter and take seisin or possession of the land, by way of protection against intruders, till the heir appeared to claim it, and receive investiture: during which interval the lord

(z) C. 22, 23, 24.

(a) 2 Roll. Abr. 514.

(b) "*Haeres non redimet terram suam sicut faciebat tempore fratris mei, sed legitima et justa relevatione*

"*relevabit eam.*" (Text. Roffens. cap. 34.)

(c) Glanv. l. 9, c. 4; Litt. § 112.

(d) Co. Litt. 77.

was entitled to take the profits; and, unless the heir claimed within a year and day, it was by the strict law a forfeiture (*e*). This practice however seems not to have long obtained in England, if ever, with regard to tenure under inferior lords; but, as to the king's tenures *in capite*, the *prima seisina* was expressly declared, under Henry III. and Edward II., to belong to the king by prerogative, in contradistinction to other lords (*f*). The king was entitled to enter and receive the *whole profits of the land, till livery was sued; which suit being commonly made within a year and day next after the death of the tenant, in pursuance of the strict feudal rule, therefore the king used to take as an average the *first fruits*, that is to say, one year's profits of the land (*g*). And this afterwards gave a handle to the popes, who claimed to be feudal lords of the church, to claim in like manner from every clergyman in England the first year's profits of his benefice, by way of *primitiae*, or first fruits. [* 67]

4. These payments were only due if the heir was of full age; but if he was under the age of twenty-one, being a male, or fourteen, being a female (*h*), the lord was entitled to the *wardship* of the heir, and was called the guardian in chivalry. This wardship consisted in having the custody of the body and lands of such heir, without any account of the profits till the age of twenty-one in males, and sixteen in females. For the law supposed the heir-male unable to perform knight-service till twenty-one: but as for the female, she was supposed capable at fourteen to marry, and then her husband might perform the service. The lord therefore had no wardship, if at the death of the ancestor the heir-male was of the full age of twenty-one, or the heir-female of fourteen; yet, if she was then under fourteen, and the lord once had her in ward, he might keep her so till sixteen, by virtue of the statute of Westm. 1, 3 Edw. I. c. 22, the two additional years being given by the legislature for no other reason but merely to benefit the lord (*i*) (8).

4. *Wardship*.—
The right of the lord to have the custody or wardship of the heir till twenty-one in males, and sixteen in females,

the heir-male being under twenty-one, and the female under fourteen, at the death of the ancestor.

(*e*) Feud. l. 2, t. 24.

(*g*) Staundf. Prerog. 12.

(*f*) Stat. Marl. c. 16; 17 Edw. II. c. 3.

(*h*) Litt. § 103.

(*i*) Ibid.

(8) Lord Coke (in his commentary on that section of Littleton, which our author cites as authority for the conclusion he comes to in the text above),

Wardship not a part of the law of feuds so long as they were arbitrary or temporary.

[* 68]

This wardship, so far as it related to land, though it was not nor could be part of the law of feuds, so long as they were arbitrary, temporary, or for life only; yet, when they became hereditary, and did consequently often descend upon infants, who by reason of their age could neither perform nor stipulate for the services of the feud, does not seem upon feodal principles to have been unreasonable. For the wardship of the land, or custody of the feud, was retained by the lord, that he might, out of the profits thereof, provide a fit person *to supply the infant's services, till he should be of age to perform them himself (9). And if we consider the feud in its original import, as a stipend, fee, or reward for actual service, it could not be thought hard that the lord should withhold the stipend, so long as the service was suspended. Though undoubtedly to our English ancestors, where such a stipendiary donation was a mere supposition or figment, it carried abundance of hardship; and accordingly it was relieved by the charter of Henry I. before mentioned, which took this custody from the lord, and ordained that the custody, both of the land and the children, should belong to the widow or next of kin. But this noble immunity did not continue many years.

Wardship of the body consequent on the wardship of the land.

The wardship of the body was a consequence of the wardship of the land; for he who enjoyed the infant's estate was the properest person to educate and maintain him in his infancy: and also, in a political view, the lord was most con-

says, "the statute giveth the two years to the lord only to enable him to tender a convenable marriage to the heir within that time." And in his second Instit. (pp. 203, 204) he also observes, "during those two years he holdeth not the land as guardian, for his guardianship ceases at his female ward's age of fourteen, and though the statute was in truth for the advantage of the lords, the mischief to heirs-female was much greater before the act in question, against which wrong the statute provided remedy, and it was made for the restraint of the abuse."

(9) If an heir, being in ward, was created a knight, his person thereby became out of ward, the sovereign of

chivalry having adjudged him able to do knight's service: but he was not freed of the value of his marriage, which was previously vested in his lord. The case was different with respect to a party who, though under age when he was made a knight, was not then in ward: for instance, if an heir apparent was made a knight, within age, during the life of his ancestor, upon the death of that ancestor neither his person nor lands would be in ward; for, the title of wardship not having accrued, such a case did not come within the provision of the 3rd chapter of *Magna Charta*. (2nd Instit. 11, 12; *Sir Drew Drury's case*, 6 Rep. 74, 75.)

cerned to give his tenant suitable education, in order to qualify him the better to perform those services which in his maturity he was bound to render.

When the male heir arrived to the age of twenty-one, or the heir-female to that of sixteen, they might sue out their livery or *ousterlemain* (*k*); that is, the delivery of their lands out of their guardian's hands. For this they were obliged to pay a fine, namely, half a year's profits of the land; though this seems expressly contrary to *magna charta* (*l*). However, in consideration of their lands having been so long in ward, they were excused all reliefs, and the king's tenants also all primer seisins (*m*). In order to ascertain the profits that arose to the crown by these first fruits of tenure, and to grant the heir his livery, the itinerant justices, or justices in eyre, had it formerly in charge to make inquisition concerning them by a jury of the county (*n*), commonly called an *inquisitio post mortem*; which was instituted to inquire (at the death of any man of fortune) the value of his estate, the tenure by which it was *holden, and who, and of what age his heir was: thereby to ascertain the relief and value of the primer seisin, or the wardship and livery accruing to the king thereupon. A manner of proceeding that came in process of time to be greatly abused, and at length an intolerable grievance; it being one of the principal accusations against Empson and Dudley, the wicked engines of Henry VII., that, by colour of false inquisitions, they compelled many persons to sue out livery from the crown, who by no means were tenants thereunto (*o*). And afterwards, a court of wards and liveries was erected (*p*), for conducting the same inquiries in a more solemn and legal manner.

Livery of *ousterlemain*.

Fine payable thereon.

[* 69]

When the heir thus came of full age, provided he held a knight's fee *in capite* under the crown, he was to receive the order of knighthood, and was compellable to take it upon him or else pay a fine to the king. For, in those heroical times, no person was qualified for deeds of arms and chivalry who had not received this order, which was conferred with much preparation and solemnity. We may plainly discover the footsteps of a similar custom in what Tacitus relates of

On the heir's attaining twenty-one, he was compellable to receive knighthood, or pay a fine to the king.

(*k*) Co. Litt. 77.

(*l*) 9 Hen. III. c. 3.

(*m*) Co. Litt. 77.

(*n*) Hoveden. sub Ric. I.

(*o*) 4 Inst. 198.

(*p*) Stat. 32 Hen. VIII. c. 46.

This prerogative was recognized by the statute 1 Edw. II. ;

but was abolished by 16 Car. I., c. 20.

[* 70]

5. *Marriages.*
—The right of the lord to dispose of his infant ward in marriage.

the Germans, who, in order to qualify their young men to bear arms, presented them in a full assembly with a shield and lance ; which ceremony, as was formerly hinted (*q*), is supposed to have been the original of the feudal knight-hood (*r*). This prerogative, of compelling the king's vassals (10) to be knighted, or to pay a fine, was expressly recognised in parliament by the statute (11) *de militibus*, 1 Edw. II. ; was exerted as an expedient for raising money by many of our best princes, particularly by Edward VI. and Queen Elizabeth ; but yet was the occasion of heavy murmurs when exerted by Charles I. : among whose many misfortunes it was, that neither himself nor his people seemed able to distinguish between the arbitrary stretch, and the legal exertion, of prerogative. However, among the other concessions made by *that unhappy prince, before the fatal recourse to arms, he agreed to divest himself of this undoubted (12) flower of the crown, and it was accordingly abolished by statute 16 Car. I. c. 20.

5. But, before they came of age, there was still another piece of authority, which the guardian was at liberty to exercise over his infant wards ; I mean the right of *marriage*, (*maritagium*, as contradistinguished from *matrimonium*),

(*q*) Vol. I. page 404.

(*r*) “*In ipso concilio vel principum aliquis, vel pater, vel propinquus, scuto frameaque juvenem ornant.*”

“*Haec apud illos toga, hic primus juventae honos: ante hoc domus pars videntur; mox reipublicae.*” De Mor. Germ. cap. 13.

(10) I do not find that this prerogative was confined to the king's tenants: Lord Coke does not make that distinction, nor is the power of the commissioners limited to the king's tenants in the commissions issued by Edw. VI. and Queen Elizabeth ; which see in 15 Rym. Foed. 124, and 493.—CH.

(11) The instrument referred to evidently appears, from the very frame of it, not to have been an act of Parliament. Lord Coke (2nd Instit. 593) informs us, it was merely a writ which Edward II. caused to be entered of record. But, though it was merely a royal grant of further time to those who ought to be knighted, not

a parliamentary recognition of the prerogative, (as our author supposed it to be,) yet there is no doubt the prerogative was frequently exercised, and perhaps legally so, where the tenant held lands of sufficient value by free services.

(12) By assenting to the statute whereby Charles I. divested himself of this flower of the crown, he admitted that it was not undoubted. For, whoever will take the trouble of reading the act will find, that, both in its preamble and its enacting part, it speaks of the claim as one founded upon a *pretext*, and of the proceedings whereby it was enforced as *vexatious and unreasonable*.

which in its feudal sense signifies the power, which the lord or guardian in chivalry had, of disposing of his infant ward in matrimony. For, while the infant was in ward, the guardian had the power of tendering him or her a suitable match, without *disparagement* or inequality: which if the infants refused, they forfeited the value of the marriage, *valorem maritagii*, to their guardian(s); that is, so much as a jury would assess, or any one would *bonâ fide* give to the guardian for such an alliance (*t*): and, if the infants married themselves without the guardian's consent, they forfeited double the value (13), *duplicem valorem maritagii* (*u*). This seems to have been one of the greatest hardships of our ancient tenures. There were indeed substantial reasons why the lord should have the *restraint* and *control* of the ward's marriage, especially of his female ward; because of their tender years, and the danger of such female ward's intermarrying with the lord's enemy (*w*): but no tolerable pretence could be assigned why the lord should have the *sale* or *value* of the marriage. Nor indeed is this claim of strictly feudal original; the most probable account of it seeming to be this: that by the custom of Normandy the lord's consent was necessary to the marriage of his *female* wards (*x*); which was introduced into England, together with the rest of the Norman doctrine of feuds: and it is likely that the lords usually took money for such their consent, since, in the often-cited charter of Henry the first, he engages for the future to take nothing for *his* consent; which also he promises in general to give, provided such female ward were not *married to his enemy. But this, among other beneficial parts of that charter, being disregarded, and guardians still continuing to dispose of their wards in a very arbitrary unequal manner, it was provided by King John's great charter, that heirs should be married without disparagement, the next of kin having previous notice of the contract (*y*); or, as it was expressed in the first draught of that charter, *ita maritentur ne disparagentur, et per consilium propinquo-*

Fine on refusal of ward;

or on marriage without consent of the lord.

[* 71]

(*s*) Litt. § 110.

(*t*) Stat. Mert. c. 6; Co. Litt. 82.

(*u*) Litt. § 110.

(*w*) Bract. l. 2, c. 37, § 6.

(*x*) Gr. Cust. 95.

(*y*) Cap. 6. edit. Oxon.

(13) This double forfeiture did not extend to heirs female. (Co. Litt. 82 b).

Formerly confined to females;

but afterwards claimed also for males,

Right recognised by the statute of Merton.

rum de consanguinitate sua (z). But these provisions in behalf of the relations were omitted in the charter of Henry III.: wherein (a) the clause stands merely thus, "*hæredes maritentur absque disparagacione*:" meaning certainly, by *hæredes*, heirs female, as there are no traces before this to be found of the lord's claiming the marriage (b) of heirs male; and as Glanvil (c) expressly confines it to heirs female. But the king and his great lords thenceforward took a handle (from the ambiguity of this expression) to claim them both, *sive sit masculus sive fœmina*, as Bracton more than once expresses it (d): and also as nothing but disparagement was restrained by *magna carta*, they thought themselves at liberty to make all other advantages that they could (e). And afterwards this right, of selling the ward in marriage, or else receiving the price or value of it, was expressly declared by the statute of Merton (f); which is the first direct mention of it that I have met with, in our own or any other law (14).

(z) Cap. 3. edit. Oxon.

(a) Cap. 6.

(b) The words *maritare* and *maritatum* seem *ex vi termini* to denote the providing of an *husband*.

(c) L. 9, c. 9 & 12, and l. 9, c. 4.

(d) L. 2, c. 38, § 1.

(e) Wright, 97.

(f) 20 Hen. III. c. 6.

(14) The guardian in chivalry was not accountable for the profits made of the infant's land during the wardship, but received them for his own private emolument, subject only to the *bare* maintenance of the infant. No means appear to have been provided for enforcing the guardian, out of the profits of the estate in wardship, to support and educate the infant in a style and manner suitable to his rank and fortune. Guardianship in chivalry, being deemed more an *interest*, for the *profit* of the *guardian*, than a *trust* for the benefit of the ward, was saleable and transferrible, like the ordinary subjects of property, to the best bidder, and, if not disposed of, was transmissible to the lord's personal representatives. Thus, the custody of the infant's person, as well as the care of his estate, might be devolved on the

most perfect stranger to the infant, one prompted by every pecuniary motive to abuse the delicate and important trust of education, without any ties of blood or regard to counteract the temptations of interest, and unrestrained, by any sufficient authority, from yielding to their influence.

This explication of the nature of wardship in chivalry, general as it is, may well excite a strong idea of the horrid evils necessarily incident to it. On the first reflection, it is natural to wonder how such an oppression could have been endured for several centuries after the conquest; and even remain unreformed by any effectual checks to soften its rigour, till it was wholly taken away at the restoration. Perhaps, however, on further consideration, the wonder may in some

6. Another attendant or consequence of tenure by knight-service was that of *fin*es due to the lord for every *alienation*, whenever the tenant had occasion to make over his land to another. This depended on the nature of the feudal connexion (15); it not being reasonable or allowed, as we have

6. *Fines*—Sums due to the lord on alienation by the tenant.

measure be diminished. Guardianship in chivalry only took place when the heir succeeded by *descent*: and various modes of preventing the descent were practised; first, either by enfeoffing the heir in the ancestor's life-time, or enfeoffing strangers, on such conditions as were sure to entitle the heir to enter, when he came of age, for breach of the conditions; and when these modes were declared (by the Stat. of Marlbridge) to be fraudulent, they were succeeded by another, more fit to attain the same end; for, *uses* and *trusts* being invented, and guardianship in chivalry being only of *legal* estates, feoffments to uses were made, and the heir taking only the use of the land on a descent, instead of becoming legal tenant, thus escaped being in wardship. This evasion was prevented (by stat. 4 Hen. VII. c. 17); but, in the succeeding reign, the statute of wills gave the power of devising so as to deprive the lord of the wardship in *two thirds* of the land holden by knight's service; in which contracted state this odious species of guardianship was suffered to languish, till it was entirely abolished by the famous statute of Charles II. as mentioned at the end of this chapter. (See Mr. Hargrave's 11th note to Co. Litt. 82 b.)

If any Englishman of the present day is not duly sensible of his happiness in living under such a government as ours now is; the best cure for his discontent will be a comparison of the actual liberty and security for rights, which we at present enjoy, with the condition of our ancestors. Like all other human institutions, our political ones are no doubt still sus-

ceptible of improvement, and without constant watchfulness their administration must, from the operation of selfish causes, have a natural tendency to degenerate into abuses; but, whilst vigilance and spirit in the defence, or just enlargement, of our privileges, are praiseworthy, a warm and grateful attachment to those constitutional advantages we do enjoy, is a bounden duty. (See *ante*, the concluding paragraph of the note to p. 49.)

(15) In the time of the Saxons, every landed proprietor had an unlimited power of alienation. (See *ante*, p. 47, and *post*, p. 84.) But, upon the establishment, by the Normans, of the feudal law, all lands became unalienable by the tenants thereof, and for a long time continued so, with respect to tenants *in capite*. This doctrine, however, though strictly consonant with the nature of proper feuds, was not rigidly adhered to when a subject was the lord of the fee; and the real, or supposed, inconveniences resulting from the deviation, were thoughtworthy of correction by *Magna Charta*, ch. 32. (Wright's Law of Ten. 157; 2nd Instit. 65.) But, the statute commonly called *Quia emptores*, (Westm. 3, c. 1, 18 Edw. I.) materially varied from the law of feuds, when (at the same time that the practice of subinfeudation was prohibited,) a general license was given to the tenants of common lords to sell all, or any part, of their lands, to hold of the next immediate lord, which, it seems, they could not before have done without the consent of the lord. (See the next note, and the 6th and 19th chapters of this volume, pp. 91, and 289, with the notes thereto.)

[* 72]

before seen, that a feudatory should transfer his lord's gift to another, and substitute a new tenant to do the service in his own stead, without the consent of the lord: and, as the feo^{*}dal obligation was considered as reciprocal, the lord also could not alienate his seignory without the consent of his tenant, which consent of his was called an *attornment*. This restraint upon the lords soon wore away; that upon the tenants continued longer. For when every thing came in process of time to be bought and sold, the lords would not grant a license to their tenant, to aliene, without a fine being paid; apprehending that, if it was reasonable for the heir to pay a fine or relief on the renovation of his paternal estate, it was much more reasonable that a stranger should make the same acknowledgment on his admission to a newly-purchased feud. With us in England, these fines seem only to have been exacted from the king's tenants *in capite*, who were never able to aliene without a license: but as to common persons, they were at liberty, by *magna carta* (g) (16), and the statute of *quia emptores* (h), (if not earlier,) to aliene the whole of their estate, *to be holden of the same lord as they themselves held it of before*. But the king's tenants *in capite*, not being included under the general words of these statutes, could not aliene without a license: for if they did, it was in ancient strictness an *absolute forfeiture* of the land (i); though some have imagined otherwise. But this severity was mitigated by the statute 1 Edw. III. c. 12, which ordained, that, in such case, the lands should not be forfeited, but a reasonable fine be paid to the king. Upon which statute it was settled, that one third of the yearly value should be paid for a license of alienation; but if the

(g) Cap. 32.

(i) 2 Inst. 66.

(h) 18 Edw. I. c. 1.

(16) Our author has the high authority of Lord Coke in support of his opinion, that the right of the tenants of common persons to alien their lands, without a license, was recognized by *Magna Charta* (1 Instit. 43 a; 2 Instit. 65, 501.) This recognition, however, is not distinctly expressed in the charter, and the con-

struction of Lord Coke and of Blackstone has been repudiated, as a forced one in itself, and as being inconsistent with any reasonable interpretation of the statute of *quia emptores*. (Dalrymple's Hist. of Feud. prop. 80; Bacon's L. of Engl. 171; Wright's Law of Ten. 158; Sullivan's Lect. 385; and see the last note.)

tenant presumed to aliene without a license, a full year's value should be paid (*k*).

7. The last consequence of tenure in chivalry was *escheat* (17); which is the determination of the tenure, or dissolution of the mutual bond between the lord and tenant from the extinction of the blood of the latter by either natural or civil means: if he died without heirs of his blood, or if his blood was corrupted and stained by commission of treason (18) or felony (19); whereby every inheritable quality was entirely blotted out *and abolished. In such cases the land escheated, or fell back to the lord of the fee (*l*); that is, the tenure was determined by breach of the original condition expressed or implied in the feudal donation. In the one case, there were no heirs subsisting of the blood of the first feudatory or purchaser, to which heirs alone the grant of the feud extended; in the other, the tenant, by perpetrating an atrocious crime, showed that he was no longer to be trusted as a vassal, having forgotten his duty as a subject; and therefore forfeited his feud, which he held under the implied condition that he should not be a traitor or a felon. The consequence of which in both cases was, that the gift, being determined, resulted back to the lord who gave it (*m*) (20).

7. *Escheats*.—The reversion of the fee to the lord, on the extinction or corruption of the blood of the tenant.

[* 73]

These were the principal qualities, fruits, and consequences of tenure by knight-service: a tenure, by which the

Tenure by knight-service, created for a military purpose.

(*k*) 2 Inst. 67.

(*l*) Co. Litt. 13.

(*m*) Feud. l. 2, t. 86.

(17) This subject is treated of more at length by our author in the 15th chapter, pp. 244, *et seq.* which see, with the notes thereto.

(18) See *post*, p. 251; Vol. IV. pp. 329, 381, 385.

(19) By the statute of 54 Geo. III. c. 145, it was enacted, that no attainder for felony, (after the passing of the act,) except in cases of high treason, petit treason, or murder, should extend to the disinheriting of any heir, or to the prejudice of the right or title of any other person than the offender, during his natural life only; and that it should be lawful to the person to whom the right or interest of or in

any lands, tenements, or hereditaments, after the death of such offender, would have appertained, if no such attainder had been, to enter into the same. And the statute of 3 & 4 Gul. IV. c. 106, s. 10, enacts, that after the death of a person attainted, the attainder shall not prevent any person from inheriting land who would have been capable of inheriting the same, by tracing his descent through such relation, if he had not been attainted: thus doing away with the exceptions contained in the former act.

(20) Bracton, therefore, (p. 23,) properly calls an escheat, a species of *reversion*.

greatest part of the lands in this kingdom were holden, and that principally of the king *in capite*, till the middle of the last century; and which was created, as Sir Edward Coke expressly testifies (*n*), for a military purpose, *viz.* for defence of the realm by the king's own principal subjects, which was judged to be much better than to trust to hirelings or foreigners (21). The description here given is that of a knight-service proper; which was to attend the king in his wars. There were also some other species of knight-service; so called, though improperly, because the service or render was of a free and honourable nature, and equally uncertain as to the time of rendering as that of knight-service proper, and because they were attended with similar fruits and consequences. Such was the tenure by *grand serjeanty* (22), *per magnum servitium*, whereby the tenant was bound, instead of serving the king *generally* in his wars, to do some special honorary service to the king in person; as to carry his banner, his sword, or the like: or to be his butler, champion, or other officer, at his coronation (*o*). It was in most other respects like knight-service (*p*); only he was not bound to pay aid (*q*), or escuage (*r*); *and, when tenant by knight-service paid five pounds for a relief on every knight's fee, tenant by grand serjeanty paid one year's value of his land, were it much or little (*s*). Tenure by *cornage* (23), which was to wind a horn when the Scots or

Nature of tenure by *grand serjeanty*.

Difference between tenures by knight-service, and by *grand serjeanty*.

[* 74]

(*n*) 4 Inst. 192.

(*o*) Litt. s. 153.

(*p*) Ibid. s. 158.

(*q*) 2 Inst. 233.

(*r*) Litt. s. 158.

(*s*) Ibid. s. 154.

(21) If it be true, as our author asserts, that the greatest part of the lands in the kingdom were holden of the king *in capite*; there is no denying that such grants *in capite* were first made, exclusively, to foreigners. (See *ante*, the note to p. 48.)

(22) Mr. Hargrave (note (1) to Co. Litt. 108 a) observes, that the tenure by grand serjeanty still continues, though it is so regulated by the 12th of Cha. II. c. 24, as to be made in effect free and common socage, except so far as regards the merely honorary parts of grand serjeanty.

These are preserved, with a cautious exception, not only of those burthensome properties which really were previously incident to that species of tenure, but also of some to which it never was subject; the drawer of the act not appearing to have recollected the distinctions, as to this matter, between knight's service and grand serjeanty, which our author points out.

(23) "A tenure by cornage of a common person, was knight's service; of the king, grand serjeanty. The royal dignity made a difference of the

other enemies entered the land, in order to warn the king's subjects, was (like other services of the same nature) a species of grand serjeanty (*t*).

These services, both of chivalry and grand serjeanty, were all personal, and uncertain as to their quantity or duration. But, the personal attendance in knight-service growing troublesome and inconvenient in many respects, the tenants found means of compounding for it; by first sending others in their stead, and in process of time making a pecuniary satisfaction to the lords in lieu of it. This pecuniary satisfaction at last came to be levied by assessments, at so much for every knight's fee; and therefore this kind of tenure was called *scutagium* in Latin, or *servitium scuti*; *scutum* being then a well-known denomination for money: and, in like manner, it was called, in our Norman French, *escuage*; being indeed a pecuniary (24), instead of a military, service.

Both these services were personal and uncertain,

Pecuniary satisfaction in lieu of personal attendance in knight-service, called *escuage* or *scutage*,

(*t*) Litt. s. 156.

tenure in this case." (Co. Litt. 107 a.) So the dignity of the person of the king gave the name of *petit serjeanty* to services, which, if rendered to a common person, would have been called plain *socage*; the incidents being, in fact, only such as belonged to *socage*. (Co. Litt. 108 b; and see *post*, our author's observation to a similar effect, in p. 82.)

(24) The burthen, no doubt, very soon became commutable for a pecuniary one, but whether it was so originally is questionable. And the probability is, that it was not till the service of *the shield* was commuted for a *money* payment, that *escu* (or *ecu*) became the denomination of a coin, as well as (what it previously had been) of a *shield*. (Co. Litt. 68 b, 73 a, 87 a.)

Wright (in his L. of Ten. 121) considers *escuage* to be "one of the most obscure and unintelligible branches of tenure;" and (in his note to p. 125) he cites authorities for holding, that "escuage or scutage, was not so called because it was, properly speaking,

servitium scuti, but it was *servitium a scuto dictum, quia pertinens ad scutum, et quia nomine scutorum solvitur*." He adds also (from Mad. Hist. of Exch.) that *scutagium* was a word, at all events, not used in relation to tenure alone, but likewise "in a more extensive sense, to signify any payment assessed upon *knight's fees*, whether such payment was for the king's army or not." And he further tells us (from Spelm. Treat. of Feuds) that "the words *scutagium* and *escuage* were novelties introduced here, and not to be found amongst the feudists, no, not among the French or Normans themselves."

Mr. Hargrave was of opinion (see his note to Co. Litt. 73 a) that notwithstanding Littleton sometimes uses vague expressions, from which it might be inferred, that he considered *escuage* to be a distinct tenure, he did not in fact so consider it: but, on the contrary, that he has expressly stated *certain* *escuage* to be *socage*, and *uncertain* *escuage* to be *knight's service*. This, Mr. Hargrave thought, afforded

The first time this appears to have been taken was in the 5 Hen. II., on account of his expedition to Toulouse; but it soon came to be so universal, that personal attendance fell quite into disuse. Hence we find in our ancient histories, that, from this period, when our kings went to war, they levied scutages on their tenants (25), that is, on all the landholders of the kingdom, to defray their expenses, and to hire troops; and these assessments, in the time of Hen. II., seem to have been made arbitrarily and at the king's pleasure. Which prerogative being greatly abused by his successors, it became matter of national clamour; and King John was obliged to consent by his *magna carta*, that no scutage should be imposed without consent of parliament (u). But this clause was omitted in his son Henry III.'s charter, [* 75] where we only find (w) that scutages *or escuage should be taken as they were used to be taken in the time of Henry II.: that is, in a reasonable and moderate manner. Yet afterwards by statute 25 Edw. I. c. 5, 6, and many subsequent statutes (x), it was again provided, that the king should take no aids or tasks but by the common assent of the realm: hence it was held in our old books, that escuage or scutage could not be levied but by consent of parliament (y) (26); such scutages being indeed the groundwork of all succeeding subsidies, and the land-tax of later times (27).

(u) *Nullum scutagium ponatur in regno nostro, nisi per commune consilium regni nostri.* Cap. 12.

(w) Cap. 37.

(x) See Vol. I. p. 140.

(y) Old Ten. tit. Escuage.

strong support to the doctrine of Madox, who did not allow escuage to be a tenure of itself, but insisted that it was merely an incident to tenure. (See our author's observation in p. 80.)

(25) If a tenant who held of the king by escuage, or by tenure subject to the incident of escuage, duly paid escuage to the king, it seems he was entitled to escuage from his own tenants, holding under him by that service, just as much as if he had attended the king personally or by deputy; though there is some little ambiguity

in Lord Coke's language as to this point. (See 1 Inst. 72 b, and note (4) thereto.)

(26) And parliaments appear not to have been very tractable as to this matter; for, Lord Coke tells us, (1 Inst. 72 b,) no escuage was assessed by parliament after the 8th year of the reign of Edward II. This mode of supply, therefore, had fallen into disuse three centuries and a half before it was expressly abrogated by the statute of 12 Cha. II.

(27) See Vol. I. p. 309.

Since, therefore, escuage differed from knight-service in nothing, but as a compensation differs from actual service, knight-service is frequently confounded with it. And thus Littleton (z) must be understood, when he tells us, that tenant by homage, fealty, and escuage, was tenant by knight-service: that is, that this tenure (being subservient to the military policy of the nation) was respected (a) as a tenure in chivalry (b). But as the actual service was uncertain, and depended upon emergencies, so it was necessary that this pecuniary compensation should be equally uncertain, and depend on the assessments of the legislature suited to those emergencies. For had the escuage been a settled invariable sum, payable at certain times, it had been neither more nor less than a mere pecuniary rent; and the tenure, instead of knight-service, would have then been of another kind, called socage (c), of which we shall speak in the next chapter.

which render
was uncertain,
and dependent
upon emergen-
cies.

For the present I have only to observe, that by the degenerating of knight-service, or personal military duty, into escuage, or pecuniary assessments, all the advantages (either promised or real) of the feudal constitution were destroyed, and nothing but the hardships remained. Instead of forming a national militia composed of barons, knights, and gentlemen, bound by their interest, their honour, and their oaths, to defend their king and country, the whole of this system of *tenures now tended to nothing else but a wretched means of raising money to pay an army of occasional mercenaries. In the mean time the families of all our nobility and gentry groaned under the intolerable burthens, which (in consequence of the fiction adopted after the conquest) were introduced and laid upon them by the subtlety and finesse of the Norman lawyers. For, besides the scutages to which they were liable in defect of personal attendance, which however were assessed by themselves in parliament, they might be called upon by the king or lord paramount for *aids*, whenever his eldest son was to be knighted or his eldest daughter married; not to forget the ransom of his own person. The heir, on the death of his ancestor, if of full age, was plundered of the first emoluments arising from

Consequences of
the degenerating
of knight-service
into *escuage*;

[* 76]

and burthens in-
cident thereto.

(z) S. 103.

Flet. l. 2, c. 14, s. 7.

(a) Wright, 122.

(c) Litt. s. 97, 120.

(b) *Pro feodo militari reputatur.*

his inheritance, by way of *relief* and *primer seisin*; and, if under age, of the whole of his estate during infancy. And then, as Sir Thomas Smith (*d*) very feelingly complains, “when he came to his own, after he was out of *wardship*, “his woods decayed, houses fallen down, stock wasted and “gone, lands let forth and ploughed to be barren,” to reduce him still farther, he was yet to pay half a year’s profits as a fine for suing out his *livery*; and also the price or value of his *marriage*, if he refused such wife as his lord and guardian had bartered for, and imposed upon him; or twice that value, if he married another woman. Add to this, the untimely and expensive honour of *knighthood*, to make his poverty more completely splendid. And when by these deductions his fortune was so shattered and ruined, that perhaps he was obliged to sell his patrimony, he had not even that poor privilege allowed him, without paying an exorbitant fine for a *license of alienation*.

Occasional and partial redress of these grievances, and their final removal by the 12 Car. II. c. 24.

[* 77]

A slavery so complicated, and so extensive as this, called aloud for a remedy in a nation that boasted of its freedom. Palliatives were from time to time applied by successive acts of parliament, which assuaged some temporary grievances. Till at length the humanity of King James I. consented (*e*), in consideration of a proper equivalent, to abolish them all; though the plan *proceeded not to effect; in like manner as he had formed a scheme, and begun to put it in execution, for removing the feudal grievance of heritable jurisdictions in Scotland (*f*), which has since been pursued and effected by the statute 20 Geo. II. c. 43 (*g*). King James’s plan for exchanging our military tenures seems to have been nearly the same as that which has been since pursued; only with this difference, that, by way of compensation for the loss which the crown and other lords would sustain, an annual fee-farm rent was to have been settled and inseparably annexed to the crown and assured to the inferior lords, payable out of every knight’s fee within their respective seignories. An expedient seemingly much better than the hereditary excise, which was afterwards made the principal equivalent for these concessions. For at length the military

(*d*) Commonw. l. 3, c. 5.

(*e*) 4 Inst. 202.

(*f*) Dalrymp. of Feuds, 292.

(*g*) By another statute of the same

year (20 Geo. II. c. 50,) the tenure of *wardholding* (equivalent to the knight-service of England) is for ever abolished in Scotland.

tenures, with all their heavy appendages (having during the usurpation been discontinued) were destroyed at one blow by the statute 12 Car. II. c. 24, which enacts, "that the
 "court of wards and liveries, and all wardships, liveries,
 "primer seisins, and ousterlemains, values and forfeitures
 "of marriages, by reason of any tenure of the king or others,
 "be totally taken away. And that all fines for alienations,
 "tenures by homage, knight-service, and escuage, and also
 "aids for marrying the daughter or knighting the son, and
 "all tenures of the king *in capite*, be likewise taken
 "away (28). And that all sorts of tenures, held of the king
 "or others, be turned into free and common socage; save
 "only tenures in frankalmoign, copyholds, and the hono-
 "rary services (without the slavish part) of grand serjeanty." A statute, which was a greater acquisition to the civil property of this kingdom than even *magna carta* itself: since that only pruned the luxuriances that had grown out of the military tenures, and thereby preserved them in vigour; but the statute of King Charles extirpated the whole, and demolished both root and branches.

(28) It would be ludicrous to undervalue this statute because it appears to have been ill drawn; though Mr. Hargrave, (in his note to Co. Litt. 108 b,) says, they who attribute the framing of it to Chief Justice Hale, act very injuriously to the memory of that shining ornament of his profession. The grand object of the act, no doubt, was to discharge lands held *in capite* of the oppressive incidents of that tenure; not to declare

that no one should thenceforward hold *in chief*, or immediately from the crown. Before the statute, as well as since, many lands were held of the king by socage tenure, yet they were not, and are not, the less tenures *in capite*, (see our author's remark, *post*, in p. 89,) which, in its genuine sense, means only that no intermediate lord was interposed between the tenant and the lord paramount. (Mad. Baron. Angl. 238, 239.)

CHAPTER VI.

OF THE MODERN ENGLISH TENURES.

The tenures of socage and frankalmoign, the honorary services of grand serjeanty, and tenure by copy of court-roll reserved.

ALTHOUGH, by the means that were mentioned in the preceding chapter, the oppressive or military part of the feudal constitution was happily done away, yet we are not to imagine that the constitution itself was utterly laid aside, and a new one introduced in its room: since, by the statute 12 Car. II. the tenures of socage and frankalmoign, the honorary services of grand serjeanty, and the tenure by copy of court-roll, were reserved; nay, all tenures in general, except frankalmoign, grand serjeanty, and copyhold, were reduced to one general species of tenure, then well known and subsisting, called free and common socage. And this, being sprung from the same feudal original as the rest, demonstrates the necessity of fully contemplating that ancient system (1); since it is that alone to which we can recur, to explain any seeming or real difficulties, that may arise in our present mode of tenure.

In military tenure, the services were free and honourable, but uncertain:

in free-socage, certain.

The military tenure, or that by knight-service, consisted of what were reputed the most free and honourable services, but which in their nature were unavoidably uncertain in respect to the time of their performance. The second species of tenure, or *free-socage*, consisted also of free and honourable services; but such as were liquidated and reduced to an absolute certainty. And this tenure not only subsists to this day, but has in a manner absorbed and swallowed up (since the statute of Charles the second) almost every other species of tenure. And to this we are next to proceed.

(1) See *ante*, pp. 44—58, and the notes thereto.

II. Socage, in its most general and extensive signification, seems to denote a tenure by any certain and determinate service. And in this sense it is by our ancient writers constantly put in opposition to chivalry, or knight-service, where the render was precarious and uncertain. Thus Bracton (a) (2); if a man holds by a rent in money, without any escuage or serjeanty, "*id tenementum dici potest socagium*:" but if you add thereto any royal service, or escuage, to any, the smallest, amount, "*illud dici poterit feodum militare*." So too the author of Fleta (b); "*ex donationibus, servitia militaria vel magnae serjantiae non continentibus, oritur nobis quoddam nomen generale, quod est socagium*." Littleton also (c) defines it to be, where the tenant holds his tenement of the lord by any *certain service*, in lieu of all other services; so that they be not services of chivalry, or knight-service. And therefore afterwards (d) he tells us, that whatsoever is not tenure in chivalry is tenure in socage; in like manner as it is defined by Finch (e), a tenure to be done out of war. The service must therefore be certain, in order to denominate it socage; as to hold by fealty and 20s. rent; or, by homage, *fealty* (3), and 20s. rent; or, by homage and fealty without rent; or, by fealty and certain corporal service, as ploughing the lord's land for three days; or, by fealty only without any other service: for all these are tenures in socage (f).

II. Socage, in its general signification, is a tenure by some certain and determinate service:

But socage, as was hinted in the last chapter, is of two sorts: *free-socage*, where the services are not only certain, but honourable; and *villein-socage*, where the services though certain, are of a baser nature. Such as hold by the former tenure are called in Glanvil (g), and other subsequent authors, by the name of *liberi sokemanni* (4), or tenants in free-socage. Of this tenure we are first to speak; and

and is of two kinds—*free-socage*, where the services are certain and honourable—*villein-socage*, where, though certain, they are of a baser nature.

(a) L. 2, c. 16, s. 9.

(b) L. 3, c. 14, s. 9.

(c) S. 117.

(d) S. 118.

(e) L. 147.

(f) Litt. s. 117, 118, 119.

(g) L. 3, c. 7.

(2) See *ante*, pp. 74, 75, and the notes thereto.

(3) See Vol. III. p. 230.

(4) Our author, towards the close of this chapter, (p. 100,) cites the authority of both Bracton and Brit-

ton, to shew that tenants in ancient demesne are an amphibious class, who are sometimes called *liberi sokemanni*, though they are only highly privileged villeins.

Etymology of
the word *socage*.

this both in the *nature of its service, and the fruits and consequences appertaining thereto, was always by much the most free and independent species of any. And therefore I cannot but assent to Mr. Somner's etymology of the word (*h*); who derives it from the Saxon appellation *soc*, which signifies liberty or privilege, and, being joined to a usual termination, is called *socage*, in Latin *socagium*; signifying thereby a free or privileged tenure (*i*). This etymology seems to be much more just than that of our common lawyers in general, who derive it from *soca*, an old Latin word, denoting (as they tell us) a plough (5): for that in ancient time this socage tenure consisted in nothing else but services of husbandry, which the tenant was bound to do to his lord, as to plough, sow, or reap for him; but that, in process of time, this service was changed into an annual rent by consent of all parties, and that, in memory of its original, it still retains the name of socage or plough-service (*k*). But this by no means agrees with what Littleton himself tells us (*l*), that to hold by fealty only, without paying any rent, is tenure in socage; for here is plainly no commutation for plough-service. Besides, even services, confessedly of a military nature and original, (as escuage (6), which, while it remained uncertain, was equivalent to knight-service,) the instant they were reduced to a certainty, changed both their name and nature, and were called socage (*m*). It was the *certainty* therefore that denominated it a socage tenure; and nothing sure could be a greater liberty or privilege, than to have the service ascertained, and not left to the arbitrary calls of the lord, as in the tenures of chivalry. Wherefore also Britton, who describes lands in socage tenure under the

Homage, ward, marriage, and relief, not demandable in tenure in socage.

(*h*) Gavelk. 138.

(*i*) In like manner Skene in his exposition of the Scots' Law, title *socage*, tells us, that it is "any kind of holding of lands quhen ony man

"is infeft *freely*," &c.

(*k*) Litt. s. 119.

(*l*) S. 118.

(*m*) Sect. 98, 120.

(5) In a subsequent page of this chapter, Blackstone suggests that, as lands holden as of ancient demesne are a *species* of socage tenure, plainly founded upon predial services, or services of the plough; this probably may have given cause to imagine, that

all socage tenures arose from the same original, for want of distinguishing between socage of frank tenure and socage of ancient demesne.

(6) See *ante*, the notes to pp. 74, 75.

name of *fraunke ferme* (n) (7), tells us, that they are “lands” and tenements, whereof the nature of the fee is changed “by feoffment *out of chivalry* for *certain* yearly services, and “in respect whereof neither homage, ward, marriage, nor “relief can be demanded.” Which leads us also to another observation, that if socage tenures were of such base and servile *original, it is hard to account for the very great immunities which the tenants of them always enjoyed; so highly superior to those of the tenants by chivalry, that it was thought, in the reigns of both Edward I. and Charles II., a point of the utmost importance and value to the tenants, to reduce the tenure by knight-service to *fraunke ferme* or tenure by socage. We may therefore, I think, fairly conclude in favour of Somner’s etymology, and the liberal extraction of the tenure in free socage, against the authority even of Littleton himself (8).

[* 81]

(n) C. 66.

(7) The present editor is indebted to a MS. put into his hands by the publisher, and which he is informed proceeded from the pen of a learned and noble lord, for the remark that Britton not only describes lands in socage tenure under the name of *fraunk ferme*, but seems also to think the name of sokemanry equally applicable to such lands; with this distinction only, that he considers sokemanries as tenures immediately of the crown, and *fraunk ferme* as a tenure of a *mesne* lord; but he expressly distinguishessokemanries from ancient demesne. See *post*, p. 100, our author’s observations on this head. The peer alluded to was Lord Redesdale, who, since the first publication of this note, is deceased.

(8) Mr. Christian, in his note upon this passage says, he is “obliged to prefer the old derivation for the following reasons:—Our most ancient writers derive it from *soca* or *soccus*, a plough; and *sock*, in some parts of the north of England, is the common name for a plough-share to this day. The following description of *socage* is

given by Bracton: *dici poterit socagium a socco, et inde tenentes sockmanni, eo quod deputati sunt, ut videtur, tantummodo ad culturam, et quorum custodia et meritagia ad propinquiores parentes jure sanguinis pertinebant.* (C. 35.) This is not only adopted by Littleton and Lord Coke, (Co. Litt. 86,) who says that *socagium est servitium socæ*, which is also the interpretation given by Ducange, (voc. Soc,) but Sir Henry Spelman, whose authority is high in feudal antiquities, testifies that *feudum ignobile, plebeium, vulgare* (Gall. *fief roturier*,) *nobili opponitur; et proprie dicimus, quod ignobilibus et rusticis competit, nullo feudali privilegio ornatum, nos soccagium dicimus.* Gloss. voc. Feod. And *soccagium* he explains by Gall. *roture, fief roturier. Heretages en roture.* (Ib. voc. Soc.)

“In a law of Edward the Confessor, the sokeman and villein are classed together; *Manbote de villano et sokeman xii. oras, de liberis autem hominibus iii. marcas.* (C. 12.) If we consider the nature of socage tenure, we shall see no reason why it should

Socage tenures supposed to be relics of Saxon liberty.

Gavelkind, a species of socage tenure.

Socage includes all modes of holding free lands by certain and invariable rents and duties.

Grand serjeanty, and the honorary services due thereon still reserved.

Taking this then to be the meaning of the word, it seems probable that the socage tenures were the relics of Saxon liberty (9); retained by such persons as had neither forfeited them to the king, nor been obliged to exchange their tenure, for the more honourable, as it was called, but, at the same time, more burthensome, tenure of knight-service. This is peculiarly remarkable in the tenure which prevails in Kent, called gavelkind, which is generally acknowledged to be a species of socage tenure (o); the preservation whereof inviolate from the innovations of the Norman conqueror is a fact universally known. And those who thus preserved their liberties were said to hold in *free* and *common* socage.

As therefore the grand criterion and distinguishing mark of this species of tenure are the having its renders or services ascertained, it will include under it all other methods of holding free lands by certain and invariable rents and duties: and, in particular, *petit serjeanty*, tenure in *burgage*, and *gavelkind*.

We may remember that by the statute 12 Car. II. grand serjeanty is not itself totally abolished (10), but only the slavish appendages belonging to it: for the honorary services, (such as carrying the king's sword or banner, officia-

(o) Wright, 211.

have the pre-eminence of the appellation of a privileged possession.

"It cannot be imagined that those who never grasped a sword, nor buckled on a coat of mail, should enjoy privileges and distinctions denied to the barons and milites, the companions of their sovereign. The sokemanni were indebted only to their own meanness and insignificance for their peculiar immunities. Hence, when the age of chivalry was gone, and nothing but its slavery remained, by no uncommon vicissitude in the affairs of men, the sokemanni derived from their obscurity that independence and liberty, which they have transmitted to posterity, and which we are now proud to inherit."—[Wright (in his Law of Ten. 144,) inclines to prefer that derivation of

socage which refers the tenure to services of the plough; and, upon the whole, it does appear to be the better founded conjecture.—ED.]

(9) This remark, it is presumed, was not intended to apply to villein socage, at all events. It would convey no very lofty idea of Saxon liberty, to illustrate its nature and extent by instances of those tenants who (as our author tells us in p. 99,) "continued, for a long time, pure and absolute villeins, dependent on the will of the lord." It is to the Normans, as our author seems reluctantly to admit in the course of this chapter, that the amelioration of the state of villenage, of every degree, pure or privileged, ought, in justice, to be ascribed. See *post*, p. 92.

(10) See *ante*, the note to p. 73.

ting as his butler, carver, &c. at the coronation) are still reserved. Now *petit serjeanty* bears a great resemblance to grand serjeanty; for, as the one is a personal service, so the other is a rent or render, both tending to some purpose relative to the king's per*son. Petit serjeanty, as defined by Littleton (*p*), consists in holding lands of the king by the service of rendering to him annually some small implement of war, as a bow, a sword, a lance, an arrow, or the like. This, he says (*q*), is but socage in effect: for it is no personal service, but a certain rent: and we may add, it is clearly no predial service, or service of the plough, but in all respects *liberum et commune socagium*: only being held of the king, it is by way of eminence dignified with the title of *parvum servitium regis*, or petit serjeanty (11). And *magna carta* respected it in this light, when it enacted (*r*), that no wardship of the lands or body should be claimed by the king in virtue of a tenure by petit serjeanty.

[* 82]

Petit serjeanty
—the holding of
lands of the king
by the annual
render of some
implement of
war.

No wardship in
tenures by petit
serjeanty.

Tenure in *burgage* is described by Glanvil (*s*), and is expressly said by Littleton (*t*), to be but tenure in socage: and it is where the king or other person is lord of an ancient borough in which the tenements are held by a rent certain (*u*). It is indeed only a kind of town socage; as common socage, by which other lands are holden, is usually of a rural nature. A borough, as we have formerly seen, is usually distinguished from other towns by the right of sending members to parliament; and, where the right of election is by burgage tenure, that alone is a proof of the antiquity of the borough. Tenure in burgage therefore, or burgage tenure, is where houses, or lands which were formerly the site of houses, in an ancient borough, are held of some lord in common socage, by a certain established rent (12).

Burgage tenure
is, where houses
or lands in an
ancient borough
are held of some
lord, in common
socage, by a cer-
tain and esta-
blished rent.

(*p*) S. 159.(*q*) S. 160.(*r*) Cap. 27.(*s*) Lib. 7, cap. 3.(*t*) S. 162.(*u*) Litt. s. 162, 163.(11) See *ante*, the note to p. 73.

(12) The MS. mentioned, *ante*, in the last note to p. 80, cites the following passage from Spelman's *Remains*, p. 190: "The portions of lands in Snitesham, Sharborne, and Stainhowe, given to Edwin of Sharnborne, by William Pincerna and Wil-

liam Warren, in lieu of his ancient estate in those places, were given him to be held, the two first *per certa servitia*, and the last *per servitium 40d. per annum*." If this grant by two Normans was (as seems intended to be intimated, though it is not quite clear,) the creation of a burgage

[* 83]

Borough English
where the

And these seem to have withstood the shock of the Norman encroachments principally on account of their insignificancy, which made it not worth while to compel them to an alteration of tenure; as an hundred of them put together would scarce have amounted to a knight's fee. Besides, the owners of them being chiefly artificers and persons engaged in trade, could not with any tolerable propriety be put on such a military establishment, as the tenure in chivalry was. And here also we have again an instance, where a tenure is confessedly in socage, and yet could not possibly ever have been held by plough-service; since the te*nants must have been citizens or burghers, the situation frequently a walled town, the tenement a single house; so that none of the owners was probably master of a plough, or was able to use one if he had it. The free socage therefore, in which these tenements are held, seems to be plainly a remnant of Saxon liberty; which may also account for the great variety of customs, affecting many of these tenements so held in ancient burgage; the principal and most remarkable of which is that called *Borough English* (13); so named in

tenure; then, it follows, all burgage tenures at any rate are not to be referred to a Saxon origin. That they savour of feudality is obvious; but that certainly does not decide the question; for, feudal customs were in use among the Saxons, though the system was not brought into full operation till after the Norman conquest. (See *ante*, the note to p. 45.) Wright (in his *Law of Ten.* 145) says, "though burgage and gavelkind have many qualities different from common socage, they fall under the notion of socage tenures, which, though they vary in point of service, succession, and the like, do nevertheless retain the nature of feuds; inasmuch as they are held of a lord or superior by *fealty*, and usually by some other certain service or acknowledgment; and inasmuch as they yield or pay relief, and may escheat." (See Vol. I. p. 74.) With respect to escheat, however, so far as concerns gavelkind lands, Wright

must be understood to mean, that they might escheat for *treason*; but they were never subject to escheat for felony; (see *post*, p. 84;) and as to the general relaxation of the law as to this matter, see *ante*, p. 72, note.

(13) Custom, if properly pleaded and proved, seems to be conclusive in all questions as to descent in borough English. In *Chapman v. Chapman*, (March, 54, pl. 82,) a custom respecting certain lands in borough English, that, if there were an estate in fee in those lands, they should descend to the younger son, according to the custom; but if the estate was in tail, they should descend to the heir at common law; was held to be good. The customary descent may, in particular places, be confined to estates in fee simple; (*Reeve v. Malster*, W. Jones, 363; and see *Append. to Robins. on Gavelk.*;) but it may extend to fee tail, or any other inheritance. Lord Coke says, (1 *Inst.* 100 b,) "if

contradistinction as it were to the Norman customs, and which is taken notice of by Glanvil (*w*), and by Littleton (*x*); viz. that the youngest son, and not the eldest, succeeds to the burgage tenement on the death of his father. For which Littleton (*y*) gives this reason: because the younger son, by reason of his tender age, is not so capable as the rest of his brethren to help himself. Other authors (*z*) have indeed given a much stranger reason for this custom, as if the lord of the fee had anciently a right of concubinage with his tenant's wife on her wedding-night; and that therefore the tenement descended not to the eldest, but the young-

youngest son succeeds to the burgage tenement on the death of the father.

(*w*) *Ubi supra*.

(*x*) S. 165.

(*y*) S. 211.

(*z*) 3 Mod. Pref.

lands of the nature of borough English be letten to a man and his heirs during the life of J. S., and the lessee dieth, the youngest son shall enjoy it." And, in the same place, he tells us "the customary descent may, in particular places, extend to collaterals;" but then it must be specially pleaded; for, the custom is in most places confined to cases of lineal descent; (*Bayley v. Stevens*, Cro. Jac. 198; *Reve v. Barrow*, Cro. Car. 410:) and where lands would at common law descend to the issue of the eldest son *jure representationis*, they will, by the custom of borough English, descend upon the issue of the youngest. (*Clements v. Scudamore*, 2 Lord Raym. 1024; S. C. 1 P. Wms. 63; and 1 Salk. 243.) The course of descent of lands held in gavelkind, or in borough English, cannot be altered by any limitation of the parties; for, customs which go with the land, and direct the course of inheritance, can be altered only by Parliament. (Co. Litt. 27 a; Jenkins, Cent. page 220; S. P. Dyer, 179 b; *Roe v. Aistrop*, 2 W. Blacks. 1229; 2 Hale's Hist. of Com. L. 103.) But, there is a great difference between the descent of such land and the purchase thereof: for if upon such purchase a remainder be limited to the right heir of the purchaser, or of any other person, the heir at common law will take it, and

not the customary heir. For, the remainder being newly created, could not be considered within the old custom. (*Counden v. Clerk*, Hob. 31.) On the other hand, if a man, seised in fee of lands in gavelkind, make a gift in tail, or a lease to a stranger for life, with remainder to his own right heirs, it seems all his sons will take; for the remainder limited to the right heirs of the donor is not a new purchase, but only a reversion, which will follow the customary course of descent. (Co. Litt. 10 a. *Chester v. Chester*, 3 P. Wms. 63.)

If the Court of Chancery is called upon to administer a will, creating an executory trust respecting lands held in borough English, or gavelkind, and the *cestuis que trust* are to take as purchasers; the lands will be directed to be conveyed, not to heirs according to the custom, but to the heirs at common law. (*Roberts v. Dixwell*, 1 Atk. 609; *Starkey v. Starkey*, 7 Bac. Ab. 179.) And all gavelkind and borough English lands are now deviseable; but, since the statute of frauds (29 Cha. II. c. 3,) the devise of these, as of other lands, must be in writing.

It is probable that the customs of gavelkind and borough English will shortly be abolished. Notice has been given of an intention to bring forward a measure to that effect during the present session of Parliament. (1836.)

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Other special
customs in burg-
age tenures.The principal
distinguishing
properties of
tenure in gavel-
kind are—

est son, who was more certainly the offspring of the tenant. But I cannot learn that ever this custom prevailed in England, though it certainly did in Scotland, (under the name of *mercheta* or *marcheta*,) till abolished by Malcolm III. (a). And perhaps a more rational account than either may be fetched (though at a sufficient distance) from the practice of the Tartars; among whom, according to father Duhalde, this custom of descent to the youngest son also prevails. That nation is composed totally of shepherds and herdsmen; and the eldest sons, as soon as they are capable of leading a pastoral life, migrate from their father with a certain allotment of cattle; and go to seek a new habitation. The youngest son, therefore, who continues latest with his father, is naturally the heir of his house, the rest being already provided for. And thus we find that, among many other northern nations, it was the custom for all the sons but one to migrate from the father, which one became his heir (b). So that possibly this custom, wherever it prevails, may be the remnant of that pastoral state of our British and German ancestors, which Cæsar and Tacitus describe. Other special customs there are in different burgage tenures; as that, in some, the wife shall be endowed of *all* her husband's tenements (c), and not of the third part only, as at the common law: and that, in others, a man might dispose of his tenements by will (d), which, in general, was not permitted after the conquest till the reign of Henry the eighth; though in the Saxon times it was allowable (e). A pregnant proof that these liberties of socage tenure were fragments of Saxon liberty (14).

The nature of the tenure in *gavelkind* affords us a still stronger argument. It is universally known what struggles the Kentish men made to preserve their ancient liberties, and with how much success those struggles were attended. And as it is principally here that we meet with the custom of gavelkind, (though it was and is to be found in some

(a) Seld. tit. of hon. 2. l. 47. Reg. digm. Neustr. c. 1.)
Maj. l. 4, c. 31.

(c) Litt. s. 166.

(b) *Pater cunctos filios adultos a se
pellebat, præter unum quem hæredem
sui juris relinquebat.* (Walfingh. Upo-

(d) S. 167.

(e) Wright, 172. [See *ante*, p. 71,

n.]

(14) See *ante*, the notes to pp. 81, 82, and *post*, the next note but one.

other parts of the kingdom (*f*),) we may fairly conclude that this was a part of those liberties; agreeably to Mr. Selden's opinion, that gavelkind before the Norman conquest was the general custom of the realm (*g*). The distinguishing properties of this tenure are various: some of the principal are these: 1. The tenant is of age sufficient to alienate his estate by feoffment at the age of fifteen (*h*). 2. The estate does not escheat in case of an attainder and execution for felony (15); their maxim being, "the father to the bough, the son to the plough" (*i*). 3. In most places he had a power of devising lands by will (16), before the statute for that purpose was made (*k*). 4. The lands descend, not to the eldest, youngest, or any one son only, but to all the sons together (*l*) (17); which was indeed anciently the most usual

1. The tenant of age at fifteen;

2. No escheat on attainder for felony;

3. Power of devising lands;

4. Lands descend to all the sons together.

(*f*) Stat. 32 Hen. VIII. c. 29; Kitch. of Courts, 200.

(*g*) *In toto regno, ante ducis adventum, frequens et usitata fuit: postea caeteris adempta, sed privatis quorundam locorum consuetudinibus alibi postea regerminans: Cantianis solum*

integra et inviolata remansit. (Analect. l. 2, c. 7.) [See Vol. I. p. 74. —ED.]

(*h*) Lamb. Peramb. 614.

(*i*) Lamb. 634.

(*k*) F. N. B. 198; Cro. Car. 561.

(*l*) Litt. s. 210.

(15) As to the general relaxation of the law of escheat, by the statute of 54 Geo. III., see *ante*, p. 72, note.

(16) Lord Hale (in the 2nd Vol. of his Hist. of the Com. L. p. 97) intimates, that a power of testamentary disposition was recognized generally in this country, with respect to lands as well as goods, "unto the time of Hen. II." But this is not very consistent with the statement in his 1st volume, (p. 221,) where he says, "at this day, a man may give his lands in fee simple, though he has them by descent, to any one of his children, and disinherit the rest. But *by the ancient laws used here it was not so.*" And he cites, as his authority, Glanvil, lib. 7, c. 2.

Mr. Roberts (in the 1st chapter of his Law of Wills) observes, "if the power of disposing of land was exercised by our Anglo-Saxon ancestors, (see, *ante*, p. 71, notes,) it seems much less likely that it originated

with themselves, than that they adopted it from those laws which the Roman government had established and left standing in the country." And he adds, in a note, "Whether gavelkind lands in Kent were deviseable by custom, seems to be a matter in dispute. See the arguments *pro et con.* in Rob. Gavel. 235."

(17) Up to the time of King John this appears to have been the case with respect to all socage lands. Lord Hale says, "at this day in England, and for very many ages past, all lands of inheritance, as well socage tenures as of knight's service, descend to the eldest son; unless in Kent, and some other places, where the custom directs the descent to all the males, and in some places to the youngest. But, the ancient law used in England," (he had just before specifically referred to the days of Hen. II. and Rich. I.) "though it directed knight's services and serjeanties to

course of descent all over England (*m*) (18) though in particular places particular customs prevailed. These, among other properties, distinguished this tenure in a most remarkable manner: and yet it is said to be only a species of a socage tenure, modified by the custom of the country; the lands being holden by suit of court and fealty, which is a service in its nature certain (*n*). Wherefore, by a charter of King John (*o*), Hubert, archbishop of Canterbury, was authorised to *exchange* the gavelkind tenures holden of the see of Canterbury into tenures by knight's service; and by statute 31 Hen. VIII. c. 3, for disgavelling the lands of divers lords and gentlemen in the county of Kent, they are directed to be descendible for the future *like other lands which were never holden by service of socage*. Now the immunities which the tenants in gavelkind enjoyed (19) were such, as we cannot conceive should be conferred upon mere ploughmen and peasants; from all which I think it sufficiently clear that tenures in free socage are in general of a nobler original than is assigned by Littleton, and after him by the bulk of our common lawyers.

The nature of
socage tenures
considered.

Having thus distributed and distinguished the several species of tenure in free socage, I proceed next to show that this also partakes very strongly of the feudal nature. Which may probably arise from its ancient Saxon original; since

(*m*) Glanvil, l. 7, c. 3.

(*n*) Wright, 211.

(*o*) Spelm. Cod. Vet. Leg. 355.

descend to the eldest son, directed vassalages, and socage lands to descend to *all* the sons." (1 Hist. of Com. L. 219, 220. See 2 Hale's Hist. C. L. 103, 109; as also, *post*, the 14th chapter of this volume, p. 202.)

(18) See Vol. I. pp. 74, 75.

(19) Yet our author has just furnished us with instances, showing how inferior the advantages of gavelkind tenure must have been held, by the parties applying for charters, and acts of parliament, to have their lands disgavelled. Besides the public act mentioned by our author in the text above, a private act was made in the 2 & 3 Edw. VI. with respect to certain lands

in Kent, enacting that "the lands be clearly changed, and be in no wise *de-partible*, but shall be to all intents and purposes as lands at the common law, and as if they had never been of the nature of gavelkind." Under this act a question arose, whether the other collateral qualities, as well as the partibility of the lands, were taken away? and the Court of King's Bench unanimously held that they were not; considering that if the intent of parliament had been to take away all the customs, that of partibility would not have been the only one specified. (*Wiseman v. Cotton*, T. Raym. 59, 77.)

(as was before observed(*p*)) feuds were not unknown among the Saxons, though they did not form a part of their military policy, nor were drawn out into such arbitrary consequences as among the Normans. It seems therefore reasonable to imagine, that socage tenure existed in much the same state before the conquest as after; that in Kent it was preserved with a high hand, as our histories inform us it was; and that the rest of the socage tenures dispersed through England escaped the general fate of other property, partly out of favour and affection to their particular owners, and partly from their own insignificance: since I do not apprehend the number of socage tenures soon after the conquest to have been very considerable, nor their value by any means large; till by successive *charters of enfranchisement granted to the tenants, which are particularly mentioned by Britton (*q*), their number and value began to swell so far as to make a distinct, and justly envied, part of our English system of tenures.

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However this may be, the tokens of their feudal original will evidently appear from a short comparison of the incidents and consequences of socage tenure with those of tenure in chivalry; remarking their agreement or difference as we go along.

Socage tenure and tenure in chivalry compared.

1. In the first place, then, both were held of superior lords; one of the king, either immediately, or as lord paramount, and (in the latter case) of a subject or mesne lord between the king and the tenant.

1. Both were held of superior lords;

2. Both were subject to the feudal return, render, rent(20), or service of some sort or other, which arose from a supposition of an original grant from the lord to the tenant. In the military tenure, or more proper feud, this was from its nature uncertain; in socage, which was a feud of the improper kind, it was certain, fixed, and determinate, (though perhaps nothing more than bare fealty,) and so continues to this day.

2. And were subject to the feudal render or services (those in the former being certain, in the latter uncertain);

3. Both were, from their constitution, universally subject (over and above all other renders) to the oath of fealty (21), or mutual bond of obligation between the lord and tenant(*r*).

3. To the oath of fealty;

(*p*) Page 48.

(*q*) C. 66.

(*r*) Litt. s. 117, 131.

(20) See Vol. III. p. 230,

(21) Ibid.

Which oath of fealty usually draws after it suit to the lord's court. And this oath every lord, of whom tenements are holden at this day, may and ought to call upon his tenants to take in his court baron; if it be only for the reason given by Littleton (s), that if it be neglected, it will by long continuance of time grow out of memory (as doubtless it frequently hath done) whether the land be holden of the lord or not; and so he may lose his seignory, and the profit which may accrue to him by escheats and other contingencies (t).

4. To *aids* for knighting the eldest son, and for marrying the eldest daughter of the lord:

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4. The tenure in socage was subject, of common right, to aids (22) for knighting the son and marrying the eldest daugh*ter (u): which were fixed by the statute Westm. 1, c. 36, at 20s. for every 20*l.* *per annum* so held; as in knight-service. These aids, as in tenure by chivalry, were originally mere benevolences, though afterwards claimed as matter of right; but were all abolished by the statute 12 Car. II.

5. And also to *reliefs*, though the mode of taking was different.

5. Relief is due upon socage tenure, as well as upon tenure in chivalry: but the manner of taking it is very different. The relief on a knight's fee was 5*l.*, or one quarter of the supposed value of the land; but a socage relief is one year's rent or render, payable by the tenant to the lord, be the same either great or small (w): and therefore Bracton (x) will not allow this to be properly a relief, but *quædam præstatio loco relevii in recognitionem domini*. So too the statute 28 Edw. I. c. 1, declares, that a free sokeman shall give *no relief*, but shall double his rent after the death of his ancestor, according to that which he hath used to pay his lord, and shall not be grieved above measure. Reliefs in knight-service were only payable, if the heir at the death of his ancestor was of full age: but in socage they were due even though the heir was under age, because the lord has no wardship over him (y). The statute of Charles II. reserves the reliefs incident to socage tenures; and therefore, wherever lands in fee-simple are holden by a rent (23),

(s) S. 130.

(t) *Eo maxime præstandum est, ne dubium reddatur jus domini et vetustate temporis obscuretur.* (Corvin. Jus. Feod. l. 2, t. 7.)

(u) Co. Litt. 91.

(w) Litt. s. 126.

(x) L. 2, c. 37, s. 8.

(y) Litt. s. 127.

(22) See *ante*, the note to p. 63.

(23) Where no rent is reserved, no

relief is still due of common right upon the death of a tenant (z).

6. Primer seisin was incident to the king's socage tenants *in capite*, as well as to those by knight-service (a). But tenancy *in capite* as well as primer seisins are, among the other feudal burthens, entirely abolished by the statute.

6. *Primer seisin* was also incident to the king's socage tenants *in capite*.

7. Wardship is also incident to tenure in socage; but of a nature very different from that incident to knight-service (24). For if the inheritance descend to an infant under fourteen, the wardship of him does not, nor ever did, belong to the lord of the fee; because, in this tenure, no military or *other personal service being required, there was no occasion for the lord to take the profits, in order to provide a proper substitute for his infant tenant; but his nearest relation (to whom the inheritance cannot descend) shall be his guardian in socage, and have the custody of his land and body till he arrives at the age of fourteen. The guardian must be such a one, to whom the inheritance by no possibility (25) can descend; as was fully explained, together

7. *Wardship* was also incident to tenure in socage, but differed in its nature from that in knight-service:

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The guardian must be the nearest relation to whom the inheritance could, by no possibility, descend:

(z) 3 Lev. 145.

(a) Co. Litt. 77.

relief is payable. As to the relief and primer seisin, to which lands held by knight's service were subject, see *ante*, pp. 65, 66, 67.

(24) See *ante*, the notes to pp. 68 and 71.

(25) Mr. Hargrave (in his 5th note to Co. Litt. 88 b) intimates, that this rule should be confined to possibility of *immediate* descent. If this be not so, supposing an infant were entitled to lands and his father living, the father might be deprived of the guardianship; for, the infant's heir might be a person to whom the father might, even according to the old feudal law of descent, have been heir. (See *ante*, p. 13, note 27.)

The guardianship of a father, by our law, which in this instance is founded on the law of nature, continues, with respect to his son and heir apparent, till that son attains the age of twenty-one years: but it so continues with respect to the custody of the *body* only.

(The *King v. Thorp*, Comyn, 28; *S. C.* Carth. 386.) According to the strict language of our law, an heir apparent alone can be the subject of guardianship by nature. (*Ratcliffe's case*, 3 Rep. 38.) But this technical construction must not lead us to conclude that parents have not any right to the custody of their other children; for our law gives the custody of them to their parents till the age of fourteen, by the guardianship of *nurture*. (*S. C.*) And the statute of 12 Charles II. c. 24, empowers a father (though himself under twenty-one) by deed or will, attested by two witnesses, to appoint guardians to all his children under twenty-one, and unmarried at his decease, or born after; such guardianship to last till the children attain the age of twenty-one, or for any less time, and the appointment to be effectual against all claiming as guardians in socage or otherwise, the testamentary guardian having the custody, not

and the wardship ceased at fourteen.

with the reasons for it, in the former book of these commentaries (b). At fourteen this wardship in socage ceases ;

(b) Vol. I. p. 461.

only of the children's persons, but of their estate, both real and personal. (See Vol. I. pp. 453, 461.)

Thus, it seems, a father may, by will, delegate to any stranger whom he chooses to select, a much more extensive power than the letter of the law gives to himself whilst he lives ; for, the guardianship of nurture, as we have just seen, expires at the same time as guardianship in socage does, namely, when the infant attains the age of fourteen. This is not, in theory at all events, quite satisfactory ; and though the deficiency of legal power intrusted to a living parent, for the protection of his children's persons and interests, may, in most cases, be in great measure supplied by the Court of Chancery, when application is made thereto in due time ; and, in some cases, the jurisdiction of that court may afford both preventive and corrective remedies, by the exercise of powers with which it would be neither proper nor practicable to arm every parent ; still, this intervention is not, in any case, to be obtained without expense, and must frequently be attended with painful disclosures of the private affairs of families, and have a tendency to loosen the tie of natural connexion, by teaching a child that he must look up, not to his parent, but to others, both for protection and control. There appears to be no very obvious reason why the powers which are given to a guardian by nurture or in socage, for the benefit of infants, till they reach the age of fourteen, should not be continued till the age of twenty-one : and it is not too much to say, that the technical rule, which, whilst it recognizes a father's guardianship by nature as respects his heir, till that heir is of

full age, denies its legal existence as to his other children, is a revolting absurdity.

It is believed that the right of parents to the custody of all their children under age, might be settled more satisfactorily and clearly than it is at present ; and that the powers with which parents are intrusted for the benefit and protection of their infant children, might safely be enlarged in some respects. It is not consonant with good feeling, or with good sense, that a father, in order to support an action at law for the grossest injury which can be done to his daughter, should be compelled to have recourse to a paltry fiction : and there are many conceivable cases in which the time of the Court of Chancery might be well spared, if the limits of paternal guardianship, and the powers attached thereto, were properly extended and defined.

The present writer, however, desires not to be misunderstood as if he doubted either the right or the public advantage of that general jurisdiction which the Court of Chancery maintains over all infants. It has been said, indeed, that the control originated in usurpation ; but this is much less clear than that its exercise has been most beneficial, and that, in many cases, its superintendence could not be renounced without opening a door to very serious mischiefs. There can be no disrespect, however, to the court, in wishing that its time were economized by exempting it from applications in cases which might be otherwise provided for, and that it should be called upon only when there arises "*dignus vindice nodus*."

There is no sort of doubt, that the Court of Chancery, representing the

and the heir may oust the guardian, and call him to account for the rents and profits (c): for at this age the law supposes him capable of choosing a guardian for himself. It was in this particular, of wardship, as also in that of marriage, and in the certainty of the render or service, that the socage tenures had so much the advantage of the military ones. But as the wardship ceased at fourteen, there was this disadvantage attending it: that young heirs, being left at so tender an age to choose their own guardians till twenty-one, might make an improvident choice. Therefore, when almost all the lands in the kingdom were turned into socage tenures, the same statute 12 Car. II. c. 24, enacted, that it should be in the power of any father by will to appoint a guardian, till his child should attain the age of twenty-one. And, if no such appointment be made, the Court of Chancery will frequently interpose, and name a guardian, to prevent an infant heir from improvidently exposing himself to ruin.

8. Marriage, or the *valor maritagii*, was not in socage tenure any perquisite or advantage to the guardian, but rather the reverse. For, if the guardian married his ward under the age of fourteen, he was bound to account to the ward for the value of the marriage, even though he took

8. Marriage, in socage tenure, no advantage to the guardian.

(c) Litt. s. 123 ; Co. Litt. 89.

king as *parens patriæ*, has a jurisdiction now perfectly established, to control the right of a father to the possession of his child, whenever the welfare of the child imperatively requires so strong a measure. In the words of Lord Eldon, "the court has interposed in many instances of this sort, but the application is one of the most serious and important nature; the interposition of the court stands upon principles which it ought not to put into operation without keeping in view all the feelings of a parent's heart, and all the principles of the common law with respect to a parent's rights." (*Wellesley v. The Duke of Beaufort*, 1 Russ. 19 ; and see *Lyons v. Bleakin*, Jacob's Rep. 262 ; *Shelley v. Westbrook*, Ibid. 266 ; *De Man-*

neville v. De Manneville, 10 Ves. 61 ; *Whitfield v. Hales*, 12 Ves. 492.) In the reports of the cases cited, most of the other instances in which the jurisdiction in question has been exercised, are adverted to, and whoever examines them will find that the power has been wielded by considerate hands. (See Vol. I. p. 451 ; Vol. III. p. 427.)

The control of the Court of Chancery over the property of infants who are made its wards, is of course absolute; and many statutes, (the marriage act and others,) in effect, recognize the chancellor as the constitutional depositary of that part of the king's prerogative or paternal duty, (whichever it may most properly be called) which consists of the guardianship of his infant subjects.

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nothing for it, unless he married him to advantage (*d*). For, the law in favour of infants is always jealous of guardians, and therefore in this case it made them account, not only for what they *did*, but also for what they *might*, receive on the infant's behalf: *lest by some collusion the guardian should have received the value, and not brought it to account: but the statute having destroyed all values of marriages, this doctrine of course hath ceased with them. At fourteen years of age the ward might have disposed of himself in marriage, without any consent of his guardian, till the late act for preventing clandestine marriages. These doctrines of wardship and marriage in socage tenure were so diametrically opposite to those in knight-service, and so entirely agree with those parts of King Edward's laws, that were restored by Henry the first's charter, as might alone convince us that socage was of a higher original than the Norman conquest.

9. *Fines* for alienation were due for lands holden of the king *in capite* by socage tenure.

9. Fines for alienation were, I apprehend, due for lands holden of the king *in capite* by socage tenure (26), as well as in case of tenure by knight-service: for the statutes that relate to this point, and Sir Edward Coke's comment on them (*e*), speak generally of all tenants *in capite*, without making any distinction: but now all fines for alienation are demolished by the statute of Charles the second.

10. *Escheats* also incident to tenure in socage.

10. Escheats are equally incident to tenure in socage, as they were to tenure by knight-service; except only in gavelkind lands, which are (as is before mentioned) subject to no escheats for felony (27), though they are to escheats for want of heirs (*f*).

Tenure by knight-service abolished at the restoration; since which all lands have been held in socage.

Thus much for the two grand species of tenure, under which almost all the free lands of the kingdom were holden till the restoration in 1660, when the former was abolished and sunk into the latter: so that the lands of both sorts are now holden by one universal tenure of free and common socage.

The other grand division of tenure is that of *villenage*, which

The other grand division of tenure, mentioned by Bracton as cited in the preceding chapter, is that of *villenage*,

(*d*) Litt. s. 123.

(*e*) 1 Inst. 73; 2 Inst. 65, 66, 67.

(*f*) Wright, 210.

(26) See *ante*, p. 77, note.

(27) See *ante*, p. 72, note.

as contradistinguished from *liberum tenementum*, or frank tenure. And this (we may remember) he subdivided into two classes, *pure* and *privileged* villenage: from whence have arisen two other species of our modern tenures.

*III. From the tenure of pure villenage have sprung our present *copyhold* tenures, or tenure by copy of court-roll at the will of the lord: in order to obtain a clear idea of which it will be previously necessary to take a short view of the original and nature of manors.

III. From the former have sprung the copyhold tenures of the present day.

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Manors are in substance as ancient as the Saxon constitution, though perhaps differing a little, in some immaterial circumstances, from those that exist at this day (*g*): just as we observed of feuds, that they were partly known to our ancestors, even before the Norman conquest. A manor, *manerium*, a *manendo* (28), because the usual residence of the owner seems to have been a district of ground, held by lords or great personages, who kept in their own hands so much land as was necessary for the use of their families, which were called *terrae dominicales* or *demesne* lands; being occupied by the lord, or *dominus manerii*, and his servants. The other, or *tenemental*, lands they distributed among their tenants: which, from the different modes of tenure, were distinguished by two different names. First, *book-land*, or charter land, which was held by deed under certain rents and free-services, and in effect differed nothing from the free-socage lands (*h*): and from hence have arisen most of the freehold (29) tenants who hold of particular

Origin and nature of manors.

Original modes of tenure of manor lands:

book-land;

(*g*) Co. Cop. s. 2 & 10.

(*h*) Ibid. s. 3.

(28) Mr. Watkins (1 Treat. of Cop. 7,) following Lord Coke, (Copyh. p. 52,) prefers that derivation of the word manor, which brings it from the Norman French word *mesner*, to guide; as most agreeing with the nature of a manor, all the tenants of which were under the guidance of the lord thereof. Lord Coke held this etymology most probable, because (he says) a manor signifies the jurisdiction and royalty incorporate, rather than the land or site. Whatever the derivation of the word may be, it is certain, that the jurisdiction was, as our author

himself informs us, at least as essential to the constitution of a manor, (or lordship or barony,) as a mansion house ever was.

(29) See *post*, pp. 99, 100. Our author wrote a distinct treatise, the express object of which was to establish, that tenants who hold by copy of court-roll according to the custom of a manor, though not at the will of the lord, are not freeholders. And his arguments were thought by the legislature to have so much weight, that an act was passed (31 Geo. II. c. 14,) enacting, that no person who held his

folk-land.

Courts-baron.

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All manors existing at this day, must have existed before the statute of *quia emptores*, 18 Edw. 1.

manors, and owe suit and service to the same. The other species was called *folk-land*, which was held by no assurance in writing, but distributed among the common folk or people at the pleasure of the lord, and resumed at his discretion; being indeed land held in villenage, which we shall presently describe more at large. The residue of the manor being uncultivated, was termed the lord's waste, and served for public roads, and for common of pasture to the lord and his tenants. Manors were formerly called baronies, as they still are lordships: and each lord or baron was empowered to hold a domestic court, called the court-baron (30), for redressing misdemeanors and nuisances within the manor; and for settling disputes of property among the tenants. This court is an inseparable ingredient of every manor; and if the number * of suitors should so fail as not to leave sufficient to make a jury or homage, that is, two tenants at least, the manor itself is lost (31).

In the early times of our legal constitution, the king's greater barons, who had a large extent of territory held under the crown, granted out frequently smaller manors to inferior persons to be holden of themselves: which do therefore now continue to be held under a superior lord, who is called in such cases the lord paramount over all these manors; and his seignory is frequently termed an honour, not a manor, especially if it hath belonged to an ancient feudal baron, or hath been at any time in the hands of the crown. In imitation whereof these inferior lords began to carve out and grant to others still more minute estates, to be held as of themselves, and were so proceeding downwards *in infinitum*, till the superior lords observed, that by this

estate by copy of court-roll, should be entitled thereby to vote at the election of any knight of a shire. But, now, by the 19th section of the statute of 2 Gul. IV. c. 45, property of this description, if of the yearly value of 10*l.* gives an unquestionable qualification. (As to the nature of such tenures, see *Roe v. Vernon and Vyse*, 5 East, 83; and see *Doe v. Danvers*, 7 East, 299; *Brown v. Rawlins*, 7 East, 428; but see also, *contra*, *Rogers v. Bradley*, 2 Vent. 144; *Hughes v.*

Harrys, Cro. Car. 229; *Gale v. Noble*, Carth. 432.

(30) See *ante*, p. 54; *post*, p. 365; Vol. III. p. 33.

(31) See *Glover v. Lane*, 3 T. R. 447. But see, *contra*, *Long v. Heming*, Cro. Eliz. 210, and Co. Litt. 58 a; 1 Anderson, 257. The manor, it should seem, may continue to exist, though the power of holding a court-baron may be gone, for want of a sufficient number of suitors. See *Soane v. Ireland*, 10 East, 260.

method of subinfeudation (32) they lost all their feudal profits of wardships, marriages, and escheats, which fell into the hands of these mesne or middle lords, who were the immediate superiors of the *terre-tenant*, or him who occupied the land: and also that the mesne lords themselves were so impoverished thereby, that they were disabled from performing their services to their own superiors. This occasioned first, that provision in the thirty-second chapter of *magna carta*, 9 Hen. III. (which is not to be found in the first charter granted by that prince, nor in the great charter of King John (*i*)), that no man should either give or sell his land, without reserving sufficient to answer the demand of his lord; and, afterwards, the statute of Westm. 3, or *quia emptores*, 18 Edw. I. c. 1, which directs, that, upon all sales or feoffments of land, the feoffee shall hold the same, not of his immediate feoffor, but of the chief lord of the fee, of whom such feoffor himself held it. But these provisions not extending to the king's own tenants *in capite*, the like law concerning them is declared by the statutes of *prerogativa regis*, 17 Edw. II. c. 6, and of 34 Edw. III. c. 15, by which last all subinfeudations, previous to the reign of King *Edward I., were confirmed: but all subsequent to that period were left open to the king's prerogative. And from hence it is clear, that all manors existing at this day, must have existed as early as king Edward the first; for it is essential to a manor, that there be tenants who hold of the lord; and, by the operation of these statutes, no tenant *in capite* since the accession of that prince, and no tenant of a common lord since the statute of *quia emptores*, could create any new tenants to hold of himself (33).

[* 92]

Now, with regard to the folk-land, or estates held in vil-

The nature of
tenures in vil-
lenage.

(*i*) See the Oxford editions of the charters.

(*k*) Wright, 215.

(32) See *ante*, the note to p. 72.

(33) See *ante*, the note to p. 43; and *post*, p. 289.

(34) The nature of heriots is de-

tailed in part, *post*, p. 97, and more fully in pp. 422, 424, which see, with the notes thereto.

usually attend it, may seem to have somewhat Danish in its composition. Under the Saxon government there were, as Sir William Temple speaks (*l*), a sort of people in a condition of downright servitude (35), used and employed in the most servile works, and belonging, both they, their children, and effects, to the lord of the soil, like the rest of the cattle or stock upon it. These seem to have been those who held what was called the folk-land, from which they were removeable at the lord's pleasure. On the arrival of the Normans here, it seems not improbable, that they who were strangers to any other than a feudal state, might give some sparks of enfranchisement to such wretched persons as fell to their share, by admitting them as well as others, to the oath of fealty; which conferred a right of protection, and raised the tenant to a kind of estate superior to downright slavery, but inferior to every other condition (*m*). This they called villenage, and the tenants villeins, either from the word *vilis* (36), or else, as Sir Edward Coke tells us (*n*), *a villa*; because they lived chiefly in villages, and were employed in rustic works of the most sordid kind: resembling the Spartan *helotes*, to whom alone the culture of the lands was consigned; their rugged masters, like our northern ancestors, esteeming war the only honourable employment of mankind.

The tenants were called villeins, and were either

[* 93]

villeins *regardant*—annexed to the manor; or *in gross*—annexed to the person of the lord, and transferrible by deed:

* These villeins, belonging principally to lords of manors, were either villeins *regardant*, that is, annexed to the manor or land; or else they were *in gross*, or at large, that is, annexed to the person of the lord, and transferrible by deed from one owner to another (*o*). They could not leave their lord without his permission; but if they ran away, or were purloined from him, might be claimed and recovered by action, like beasts or other chattels. They held indeed small portions of land by way of sustaining themselves and families; but it was at the mere will of the lord, who might dispossess them whenever he pleased; and it was upon villein

(*l*) Introd. Hist. Engl. 59.

(*m*) Wright, 217.

(*n*) 1 Inst. 116.

(*o*) Litt. s. 181.

(35) A pleasant illustration of that Saxon *liberty* which our author is so fond of eulogizing. See pp. 81 and 423, with the notes.

(36) See *ante*, the note at the foot of p. 53, which is partly Mr. Christian's.

services, that is, to carry out dung, to hedge and ditch the lord's demesnes, and any other the meanest offices (*p*): and their services were not only base, but uncertain both as to their time and quantity (*q*). A villein, in short, was in much the same state with us, as Lord Molesworth (*r*) describes to be that of the boors in Denmark, and which Stiernhook (*s*) attributes also to the *traals* or slaves in Sweden; which confirms the probability of their being in some degree monuments of the Danish tyranny. A villein could acquire no property either in lands or goods: but, if he purchased either, the lord might enter upon them, oust the villein, and seize them to his own use, unless he contrived to dispose of them again before the lord had seized them; for the lord had then lost his opportunity (*t*). and could acquire no property.

In many places also a fine was payable to the lord, if the villein presumed to marry his daughter to any one without leave from the lord (*u*): and, by the common law, the lord might also bring an action against the husband for damages in thus purloining his property (*w*). For the children of villeins were also in the same state of bondage with their parents; whence they were called in Latin, *nativi*, which gave rise to the female appellation of a villein, who was called a *neife* (*x*). In case of a marriage between a freeman and a neife, or a villein and a freewoman, the issue followed the condition of the father, being free if he was free, and villein if he was villein; contrary to the maxim of the civil law, that *partus sequitur ventrem*. But no bastard could be born a villein, because, by another maxim of our law, he is *nullius filius*: and as he can gain nothing by inheritance, it were The rights and liabilities of these villeins.

[* 94]

(p) Litt. s. 172.

(r) C. 8.

(q) *Ille qui tenet in villenagio faciet quicquid ei praeceptum fuerit, nec scire debet sero quid facere debet in crastino, et semper tenebitur ad incerta.* (Bracton, l. 4, tr. 1, c. 28.) (37)

(s) De jure Sueonum, l. 2, c. 4.

(t) Litt. s. 177.

(u) Co. Litt. 140.

(w) Litt. s. 202.

(x) Litt. s. 187.

[See post, p. 423, n. 2.]

(37) "This is an eloquent description of slavery. Villeins were not protected by *magna charta*; *nullus liber homo capiatur vel imprisonetur*, &c. was cautiously expressed, to exclude the poor villein; for, as Lord

Coke tells us, the lord may beat his villein, and if it be without cause, he cannot have any remedy. What a degraded condition for a being endued with reason!"—CH.

hard that he should *lose* his natural freedom by it (*y*). The law however protected the persons of villeins, as the king's subjects, against atrocious injuries of the lord : for he might not kill or maim his villein (*z*) : though he might beat him with impunity, since the villein had no action or remedy at law against his lord, but in case of the murder of his ancestor, or the maim of his own person. Neifes indeed had also an appeal of rape in case of the lord violated them by force (*a*).

Mode of enfranchising them.

Villeins might be enfranchised by manumission, which is either express or implied : express, as where a man granted to the villein a deed of manumission (*b*) : implied, as where a man bound himself in a bond to his villein for a sum of money, granted him an annuity by deed, or gave him an estate in fee, for life or years (*c*) ; for this was dealing with his villein on the footing of a freeman, it was in some of the instances giving him an action against his lord, and in others vesting in him an ownership entirely inconsistent with his former state of bondage. So also if the lord brought an action against his villein, this enfranchised him (*d*) ; for, as the lord might have a short remedy against his villein, by seizing his goods, (which was more than equivalent to any damages he could recover,) the law, which is always ready to catch at any thing in favour of liberty, presumed that by bringing this action he meant to set his villein on the same footing with himself, and therefore held it an implied *manumission. But, in case the lord indicted him for felony, it was otherwise ; for the lord could not inflict a capital punishment on his villein, without calling in the assistance of the law.

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The uninterrupted enjoyment and regular descent of lands held by villeins at length gave rise to tenures by copy of court-roll.

Villeins, by these and many other means, in process of time gained considerable ground on their lords ; and in particular strengthened the tenure of their estates to that degree, that they came to have in them an interest in many places full as good, in others better than their lords. For the goodnature and benevolence of many lords of manors having, time out of mind, permitted their villeins and their children to enjoy their possessions without interruption, in a regular course of descent, the common law, of which cus-

(*y*) Litt. s. 187, 188.

(*z*) Ibid. s. 189, 194.

(*a*) Ibid. s. 190.

(*b*) Ibid. s. 204.

(*c*) S. 204, 205, 206.

(*d*) S. 208.

tom is the life, now gave them title to prescribe against their lords; and, on performance of the same services, to hold their lands, in spite of any determination of the lord's will. For though in general they are still said to hold their estates at the will of the lord, yet it is such a will as is agreeable to the custom of the manor; which customs are preserved and evidenced by the rolls of the several courts baron in which they are entered, or kept on foot by the constant immemorial usage of the several manors in which the lands lie. And, as such tenants had nothing to show for their estates but these customs, and admissions, in pursuance of them, entered on those rolls, or the copies of such entries witnessed by the steward, they now began to be called *tenants by copy of court-roll*, and their tenure itself a *copyhold* (e).

Thus copyhold tenures, as Sir Edward Coke observes (f), ^{Causes of this change.} although very meanly descended, yet come of an ancient house (38); for, from what has been premised, it appears, that copyholders are in truth no other but villeins, who, by a long series of immemorial encroachments on the lord, have at last established a customary right to those estates, which before were held absolutely at the lord's will (39). Which *affords

[* 96]

(e) F. N. B. 12.

(f) Cop. s. 32.

(38) Copyhold estates are of great antiquity; the description given of them by Bracton, who wrote in the time of Henry III. is precisely applicable to them in the present day. And the *Extenta Manerii*, taken in the reign of Edward I., and printed amongst the statutes, shows that customary tenants had then a certain interest in their tenements. (See also Co. Litt. 58 a.) "The custom of the manor is the soul and life of copyhold estates; without custom they are subject to the lord's will, and by custom a copyholder is as well inheritable as he who has freehold at the common law." (*Brown's case*, 4 Rep. 21; *Foiston v. Crachrode*, 4 Rep. 32.)

(39) In the second note to the case of *Grant v. Astle* (Dougl. 725,) we are informed, that Lord Loughborough doubted whether those who, like our

author, refer the origin of copyhold tenure to a mitigation of the state of villenage, are not mistaken. His Lordship founded his doubts upon the fact, that, in those parts of Germany from which the Saxons migrated into England, there are still co-existing a species of tenure exactly the same with our copyhold estates, and likewise a complete state of villenage. But the last editor of Dougl. Rep. observes, this is by no means a conclusive argument. *All* villenage may not have been done away with throughout a country, but a *partial* mitigation of that state may have taken place: and, in those instances, the privileged villeins may hold by tenure resembling our copyhold, whilst, at the same time, others less favoured may remain in a state of pure villenage. It is highly improbable, that, in our own country,

a very substantial reason for the great variety of customs that prevail in different manors with regard both to the descent of the estates, and the privileges belonging to the tenants. And these encroachments grew to be so universal, that when tenure in villenage was virtually abolished (though copyholds were reserved) by the statute of Charles II., there was hardly a pure villein left in the nation. For Sir Thomas Smith (*g*) testifies, that in all his time (and he was secretary to Edward VI.) he never knew any villein in gross throughout the realm; and the few villeins regardant that were then remaining were such only as had belonged to bishops, monasteries, or other ecclesiastical corporations, in the preceding times of popery. For he tells us, that “the
 “ holy fathers, monks, and friars, had in their confessions,
 “ and especially in their extreme and deadly sickness, con-
 “ vinced the laity how dangerous a practice it was, for one
 “ Christian man to hold another in bondage: so that tem-
 “ poral men, by little and little, by reason of that terror in
 “ their consciences, were glad to manumit all their villeins.
 “ But the said holy fathers, with the abbots and priors, did
 “ not in like sort by theirs; for they also had a scruple in
 “ conscience to impoverish and despoil the church so much,
 “ as to manumit such as were bond to their churches, or to
 “ the manors which the church had gotten; and so kept
 “ their villeins still” (40). By these several means the generality of villeins in the kingdom have long ago sprouted up into copyholders; their persons being enfranchised by manumission or long acquiescence; but their estates, in strictness, remaining subject to the same servile conditions and forfeitures as before; though, in general, the villein

(*g*) Commonwealth, b. 3, c. 10.

all villeins were at once elevated into the rank of copyholders; indeed we have every reason to be assured that the contrary was the fact. Lord Loughborough's doubts, therefore, cannot shake our author's statement in the text above, which is supported by all our best law writers on the subject, and is confirmed by the evidence of history, which furnishes distinct ex-

amples of the change of villein tenure into copyhold. (See *post*, p. 423, n. (2).)

(40) Mr. Christian, in his note on this passage, observes, that the last claim of villenage, which we find recorded in our courts, was in the 15th Ja. I. Noy, 27; 11 Harg. St. Tr. 342.

services are usually commuted for a small pecuniary quitrent (*h*).

*As a farther consequence of what has been premised, we may collect these two main principles, which are held (*i*) to be the supporters of the copyhold tenure, and without which it cannot exist: 1. That the lands be parcel of, and situate within (41) that manor, under which it is held. 2. That they have been demised, or demisable, by copy of court-roll immemorially. For immemorial custom is the life of all tenures by copy; so that no new copyhold can, strictly speaking, be granted at this day.

[* 97]

To support a copyhold tenure it is requisite—
1st. That the lands be parcel of, and within the manor.
2dly. That they have been immemorially demised or demisable by copy of court-roll.

In some manors, where the custom hath been to permit the heir to succeed the ancestor in his tenure, the estates are stiled copyholds of inheritance; in others, where the lords have been more vigilant to maintain their rights, they remain copyholds for life only: for the custom of the manor has in both cases so far superseded the will of the lord (42), that, provided the services be performed or stipulated for by fealty, he cannot, in the first instance, refuse to admit the heir of his tenant upon his death; nor, in the second, can he remove his present tenant so long as he lives, though he holds nominally by the precarious tenure of his lord's will.

In some manors the heir succeeds to the estate; in others, it is held for life only.

The fruits and appendages of a copyhold tenure, that it hath in common with free tenures, are fealty, services, (as well in rents as otherwise,) reliefs, and escheats. The two latter belong only to copyholds of inheritance; the former to those for life also. But, besides these, copyholds have

The appendages of a copyhold tenure, that it has in common with free tenures, are fealty, services, reliefs, and escheats.

(*h*) In some manors the copyholders were bound to perform the most servile offices, as to hedge and ditch the lord's grounds, to lop his trees, and reap his corn, and the like; the lord usually finding them meat and drink, and sometimes (as is still the use in the highlands of Scotland) a minstrel or piper for their diversion. (*Rot. Maner.*

de Edgware Com. Mid.) As in the kingdom of Whidah, on the slave coast of Africa, the people are bound to cut and carry in the king's corn from off his demesne lands, and are attended by music during all the time of their labour. (*Mod. Un. Hist. xvi. 429.*)

(*i*) *Co. Litt. 58.*

(41) That lands holden of a manor are parcel of that manor, is a proposition of which the two component parts seem almost identical; (*Murrel v. Smith, 4 Rep. 24*;) and, in that sense, all copyhold lands must be *within* the manor of which they are holden; but

copyholds are frequently within the parochial boundaries of parishes totally distinct and far removed from that parish which gives its name to, and is the head of, the manor. (*Melwick v. Luter, 4 Rep. 26.*)

(42) See *ante*, the note to p. 95.

Copyholds have
also heriots,

wardships,

[* 98]

also heriots, wardship, and fines. Heriots, which I think are agreed to be a Danish custom, and of which we shall say more hereafter (*k*), are a render of the best beast or other good (as the custom may be) to the lord on the death of the tenant. This is plainly a relic of villein tenure; there being originally less hardship in it, when all the goods and chattels belonged to the lord, and he might have seised them even in the villein's lifetime. These are incident to both species of copyhold; but wardship and fines to those of inheritance only. Wardship, in copyhold estates, partakes *both of that in chivalry and that in socage. Like that in chivalry, the lord is the legal guardian (43); who usually

(*k*) See ch. 28, p. 422.

(43) The statute of 9 Geo. I. c. 29, is repealed by 11 Geo. IV. and 1 Gul. IV. c. 65, but most of the provisions of the former act are embodied in the latter, with additions and amendments, and whereby in relation to copyholders who are under age, or are *femes covertes* or lunatics, and who are entitled by descent or surrender to the use of a last will, or otherwise, to be admitted tenants of any copyhold lands, it is provided, that, if they do not come in to be admitted in person, or being *femes covertes* by their attornies; or being infants by their *guardians*, or (having *no guardians*) by their attornies, (which the act enables them to appoint,) or being lunatics by the committees of their estates; at one of the three then next courts, the lord or steward, on due proclamation made, may appoint such attornies for the purpose of admission, and thereupon impose the just fines (as to which see the next note). And if such fines are not paid as directed by that act, the lord is empowered to enter and take the profits (but without liberty to fell timber) till such fines and the consequent expenses are satisfied, rendering an account to the persons entitled. If the *guardians* of such infants, the husbands of such *femes covertes*, or the committees of such

lunatics pay such fines, then they may reimburse themselves in the like manner.

In the construction of the act of 9 Geo. I. it was held both by Lord Eldon and Lord Erskine, that the Court of Chancery is not at liberty to speculate upon what the legislature might mean, beyond what it has expressed. The court, it was said, was bound to abide by the words of that act, which confined its operation to cases of descent or surrender to the use of a will; and did not apply to a title under a deed. Therefore, to a bill by a lord, praying a discovery, in aid of an action under the statute, for recovery of fines alleged to be due, a demurrer was allowed. (*Lord Kensington v. Mansell*, 13 Ves. 240.)

However, as the statute of 55 Geo. III. c. 192, subsequently enacted, that all dispositions of copyhold estates by will shall be as effectual, to all intents and purposes, although no surrender shall have been made to the use of the will, as the same would have been if a surrender to the use of the will had been made; the statute of Geo. I. was thereby, in this respect, enlarged. And, it is evident, the last-named statute materially qualified the statement in the text, that "the lord is the legal guardian:"

assigns some relation of the infant tenant to act in his stead ; and he, like the guardian in socage, is accountable to his ward for the profits. Of fines (44), some are in the nature and fines ;

whilst the statute of 11 Geo. IV. and 1 Gul. IV. extends to all titles, whether by descent, surrender to the use of a will, or otherwise.

(44) Fines, (as to which see the last note) may, by custom, be payable by a copyholder, in all, or any of the following cases, that is to say, on the change of the lord, or the change of the tenant, or for a license empowering the tenant to demise, or do any other act which, without such license, would cause a forfeiture. A fine on the change of the lord, can only be claimed when such change happens by his death ; otherwise the lords by repeated alienations might oppress the tenants by multitude of fines. (Co. Litt. 59 b.) But, a custom that such a fine shall be due upon the death of the lord who admitted the copyholder, though he sold the lordship before his death, may be good ; for such a custom is not open to the objection just stated, if no fine is claimed upon the death of the lord who succeeded to him by whom the admission was granted. (*Lowther v. Raw*, 4 Br. P. C. 210, fol. edit. ; *Duke of Somerset v. France*, 1 Str. 657.) When the fine is due on the change of the tenant, there the fine is payable as often as the tenancy is changed in any way. (*Earl of Bath v. Abney*, 1 Keny. 471 ; *S. C.* 1 Burr. 206.) If, by frequent alienations, the tenants choose to multiply the fines, they have no right to complain of the consequences of their own voluntary acts. (Co. Litt. 59 b.) But if a copyholder in fee surrenders to the use of another for life, no more will pass than is requisite to serve the estate limited to the use ; and he who made the surrender, retaining in himself the reversion, shall not pay any fine for re-admittance thereto, on

the determination of the particular estate. (*Margaret Podger's case*, 9 Rep. 107 ; *Thrustout v. Cunningham*, 2 W. Bla. 1047 ; *Bullen v. Grant*, Cro. Eliz. 148.) This rule, indeed, seems to hold generally, whenever a party comes in by virtue of his own old reversion ; for a fine, upon a change of tenancy can be due only when a new estate arises. (*The King v. The Lord of the Manor of Hendon*, 2 T. R. 485.) Upon analogous principle, a widow claiming her free bench, or dower, out of the copyhold estate of her deceased husband, need not be admitted ; for her interest is considered as a continuing part of that estate which was in him. (*Howard v. Bartlett*, Hob. 181 ; *Vaughan v. Atkyns*, 5 Burr. 2787 ; *Walker v. Walker*, 1 Ves. sen. 55 ; *Jurden v. Stone*, Hutt. 18 ; *Waldoe v. Bartlett*, Cro. Jac. 573.)

It must be recollected, that the statute of uses does not extend to copyholds ; (*Rigden v. Vallier*, 2 Ves. sen. 257 ;) and as a use lies not in tenure, (Jenk. Cent. 190, pl. 92 ; and see *post*, p. 331, of this volume,) the person having the legal estate in a copyhold interest is the tenant to the lord ; consequently, it will be upon his admission, or death, and not on the admission, or death, of the *cestui que use*, that a fine will become due. (*Trinity College, Cambridge v. Browne*, 1 Vern. 441 ; *Car v. Ellison*, 3 Atk. 75 ; *Burgess v. Wheate*, 1 W. Bla. 167 ; *Peachy v. Duke of Somerset*, 1 Str. 454.)

Whether a fine be certain or not, must be decided by the rolls of the manor. (*Allen v. Abraham*, 2 Bulst. 32 ; *Lord Gerard's case*, Godb. 265.) However, where the fine is considered to be arbitrary, it must not, upon the

which latter,
though arbitrary,
must be reason-
able.

of primer seisins, due on the death of each tenant, others are mere fines for the alienation of the lands ; in some manors only one of these sorts can be demanded, in some both, and in others neither. They are sometimes arbitrary and at the will of the lord, sometimes fixed by custom ; but, even when arbitrary, the courts of law, in favour of the liberty of copyholders, have tied them down to be *reasonable* in their extent ; otherwise they might amount to a disherison of the estate. No fine, therefore, is allowed to be taken upon descents and alienations (unless in particular circumstances) of more than two years' improved value of the estate (*k*). From this instance we may judge of the favourable disposition that the law of England (which is a law of liberty) hath always shown to this species of tenants ; by removing, as far as possible, every real badge of slavery from them,

(*k*) 2 Ch. Rep. 134.

admission of a party entitled by descent, exceed two years' improved value of the lands, without deduction of land tax. (*Grant v. Astle*, 2 Doug. 725, note.) But where the fine is payable by a purchaser, there, it has been said, the lord is not restricted to the amount of only two years' value. (*Pinsent's case*, cited 1 Freem. 496.) And of course, where a lord is not compellable to admit, he may prescribe whatever terms he pleases, as the consideration for his voluntary grant of admission ; to which terms the tenant will naturally refuse to accede, unless he thinks it for his advantage to do so. (*Paston v. Manne*, Hetl. 6 ; *Willowe's case*, 13 Rep. 3.)

So, in the manor of Harrow-on-the-hill, there is a custom, that, if a stranger purchase land, he shall pay five or six years' value for a fine ; but one who was previously a copyholder, shall only pay two-pence, or some such very small sum ; which, it has been said, lays a good ground for the custom of taking a large fine from a stranger upon his making his first purchase within the manor. (*Hayes v. Croyden*, cited 1 Show. 86.) Dolben, J., said,

(in *King v. Dilliston*, 1 Show. 86,) he was of opinion, that if there was great delay on the part of an infant, as to the application for admission, that might justify the lord in demanding a larger fine than two years' value. But, since the statute of 9 Geo. I. mentioned in the last note, this question need never arise.

Till admission has been actually granted, the fine is not payable : but, after that admission, if the fine be not paid in reasonable time after demand thereof, the lord may maintain an action for it. (*Hobart v. Hammond*, 4 Rep. 28.) The amount of the fine, where the copyholder was entitled to demand admission, will depend upon the value of the premises, where it is not ascertained by custom. The lord assesses it at his peril ; if he assess it too high, he will not be entitled to recover it. But the assessment need not be entered on the court rolls, and there are cases in which it might be prejudicial to the lord if such entry were made. (*Lord Northwick v. Stanway*, 6 East, 57.) See *post*, pp. 365—372, with respect to assurances of copyhold and customary estates.

however some nominal ones may continue. It suffered custom very early to get the better of the express terms upon which they held their lands; by declaring, that the will of the lord was to be interpreted by the custom of the manor: and, where no custom has been suffered to grow up to the prejudice of the lord, as in this case of arbitrary fines, the law itself interposes with an equitable moderation, and will not suffer the lord to extend his power so far as to disinherit the tenant.

Thus much for the ancient tenure of *pure villenage*, and the modern one of *copyhold at the will of the lord*, which is lineally descended from it.

IV. There is yet a fourth species of tenure, described by Bracton under the name sometimes of *privileged villenage*, and sometimes of *villein-socage*. This, he tells us (*l*), is such as has been held of the kings of England from the conquest *downwards; that the tenants herein, "*villana faciunt servitia, sed certa et determinata*;" that they cannot aliene or transfer their tenements by grant of feoffment, any more than pure villeins can: but must surrender them to the lord or his steward, to be again granted out and held in villenage. And from these circumstances we may collect, that what he here describes is no other than an exalted species of copyhold, subsisting at this day, *viz.* the tenure in *ancient demesne*; to which, as partaking of the baseness of villenage in the nature of its services, and the freedom of socage in their certainty, he has therefore given a name compounded out of both, and calls it *villanum socagium*.

IV. Of villein-socage.

[*99]

Ancient demesne (45) consists of those lands or manors, which though now perhaps granted out to private subjects, were actually in the hands of the crown in the time of Edward the Confessor, or William the Conqueror; and so appear to have been by the great survey in the Exchequer called domesday-book (*m*). The tenants of these lands, under the crown, were not all of the same order or degree. Some of them, as Britton testifies (*n*), continued for a long time pure and absolute villeins, dependent on the will of the lord: and

Ancient demesne consists of those lands or manors which were in the hands of the crown in the times of Edward the Confessor, or William the Conqueror.

(*l*) L. 4, tr. 1, c. 28.

(*m*) F. N. B. 14, 16,

(*n*) C. 66.

(45) See Vol. I. p. 286.

those who have succeeded them in their tenures now differ from common copyholders in only a few points (*o*). Others were in a great measure enfranchised by the royal favour: being only bound in respect of their lands to perform some of the better sort of villein services, but those determinate and certain; as, to plough the king's land for so many days, to supply his court with such a quantity of provisions, or other stated services; all of which are now changed into pecuniary rents: and in consideration hereof they had many immunities and privileges granted to them (*p*); as to try the right of their property in a peculiar court of their own (46), called a court of ancient demesne, by a peculiar process, denominated a writ of *right close* (*q*); not to pay toll or taxes; not to contribute to the expenses of knights of the shire (47); not to be put on juries; and the like (*r*).

Nature of these tenures, and interest of the tenants.

[* 100]

*These tenants, therefore, though their *tenure* be absolutely copyhold, yet have an *interest* equivalent to a freehold (48): for notwithstanding their services were of a base and villenous original (*s*), yet the tenants were esteemed in all other respects to be highly privileged villeins (49); and especially for that their services were fixed and determinate, and that they could not be compelled (like pure villeins) to relinquish these tenements at the lord's will, or to hold them against their own: "*et ideo*," says Bracton, "*dicuntur liberi*." Britton also, from such their freedom, calls them

(*o*) F. N. B. 228.

(*p*) 4 Inst. 269.

(*q*) F. N. B. 11.

(*r*) Ibid. 14.

(*s*) Gilb. Hist. of Exch. 16 and 30.

(46) In *Alden's case*, (5 Rep. 105,) it was held, that, to an action of ejectment brought in the superior courts, a plea that the lands in question were ancient demesne, was good; and that the courts at Westminster would not take consuance of such an action. It seems, however, to be agreed, that this plea cannot be pleaded without leave of the superior court in which the action is brought; and notwithstanding what is said in the report of *Alden's case*, the subsequent inclination of very able judges seems to have been, that the discretion of the higher courts

would be most soundly exercised in rejecting the plea, whenever, by any informality, the case is not brought strictly within the rules established by former authorities. (*Doe v. Roe*, 2 Burr. 1047.)

(47) This appears to afford no feeble argument in support of the opinion, that the tenants of such lands were formerly not entitled to vote for knights of the shire. See *ante*, p. 90, note.

(48) But see the last note, and the note therein referred to.

(49) See *ante*, p. 62.

absolutely *sokemans*, and their tenure *sokemanries* (50); which he describes (*t*) to be “lands and tenements, which are not held by knight-service, nor by grand serjeanty, nor by petit, but by simple services, being, as it were, lands enfranchised by the king or his predecessors from their ancient demesne.” And the same name is also given them in Fleta (*u*). Hence Fitzherbert observes (*w*), that no lands are ancient demesne, but lands holden in socage: that is, not in free and common socage, but in this amphibious subordinate class of villein-socage. And it is possible, that as this species of socage tenure is plainly founded upon predial services, or services of the plough, it may have given cause to imagine that all socage tenures arose from the same original; for want of distinguishing, with Bracton, between free socage or socage of frank tenure and villein-socage or socage of ancient demesne.

Lands holden by this tenure are therefore a species of copyhold, and as such preserved and exempted from the operation of the statute of Charles II. Yet they differ from common copyholds, principally in the privileges before-mentioned: as also they differ from freeholders by one especial mark and tincture of villenage, noted by Bracton, and remaining to this day, *viz.* that they cannot be conveyed from man to man by the general common law conveyances of feoffment, and the rest; but must pass by surrender (51) to the lord or his steward, in the manner of

Mode of conveying or passing lands so holden.

(*t*) C. 66.

(*w*) N. B. 13.

(*u*) L. 1, c. 8.

(50) But see *ante*, p. 80, note.

(51) By the statute of 3 & 4 Gul. IV. c. 74, ss. 4, 5, & 6, it was enacted, that fines and recoveries of lands in ancient demesne levied or suffered in a superior court, might be reversed as to the lord by writs of deceit, but should be valid against the parties; but the time for bringing writs of deceit for this purpose was limited to the 1st day of December, 1833. So that, where no such writ was brought within the time prescribed, and the tenure in ancient demesne was suspended or destroyed, by a fine or recovery in a superior court, the tenure

is now absolutely gone, unless, after such suspension, the rights of the lord were recognized within twenty years preceding the first day of January, 1834.

There is a class of landowners, generally known by the name of customary freeholders, who seem to be only a superior class of tenants in ancient demesne; their tenure differing merely in the mode by which their estates may be transferred; which they may effect by lease and release, or other ordinary common law conveyance, without requiring any admittance by the lord to perfect the alienation,

common copyholds (52): *yet with this distinction (*x*), that in the surrender of these lands in ancient demesne, it is not used to say “*to hold at the will of the lord*” in their copies, but only, “*to hold according to the custom of the manor.*”

All lay tenures, therefore, now are either *free* tenures in common socage, or *base* tenures by copy of court-roll.

Thus have we taken a compendious view of the principal and fundamental points of the doctrine of tenures, both ancient and modern, in which we cannot but remark the mutual connexion and dependence that all of them have upon each other. And upon the whole it appears, that whatever changes and alterations these tenures have in process of time undergone, from the Saxon æra to the 12 Car. II. all lay tenures are now in effect reduced to two species: *free* tenure in common socage, and *base* tenure by copy of court-roll.

I mentioned *lay* tenures only; because there is still behind one other species of tenure, reserved by the statute of Charles II., which is of a *spiritual* nature, and called the tenure in frankalmoign.

V. Of tenure in *frankalmoign*—which is where lands are held by a religious corporation, to them and their successors for ever; and the service for which was, to pray for the souls of the donor and his heirs.

V. Tenure in *frankalmoign*, in *libera eleemosyna*, or free alms, is that whereby a religious corporation, aggregate or sole, holdeth lands of the donor to them and their successors for ever (*y*). The service which they were bound to render for these lands was not certainly defined; but only in general to pray for the souls of the donor and his heirs, dead or alive; and therefore they did no fealty, (which is incident to all other services but this) (*z*), because this divine service was of a higher and more exalted nature (*a*). This is the tenure, by which almost all the ancient monasteries and religious houses held their lands; and by which the parochial clergy, and very many ecclesiastical and eleemosynary foundations, hold them at this day (*b*); the nature of the service being upon the reformation altered, and made conformable to the purer doctrines *of the church of

[* 102]

(*x*) Kitchen on Courts, 194.

p. 53, n.]

(*y*) Litt. s. 133.

(*a*) Ibid. 135.

(*z*) Ibid. 131. [*Ante*, p. 45, n.

(*b*) Bracton, l. 4, tr. 1, c. 28, s. 1.]

though they are entitled to have it entered upon the court rolls. *Quære*, Are not such customary freeholders entitled to vote at county elections, if the yearly value of their lands

amounts to forty shillings? See *ante*, the note to p. 90.

(52) See *post*, pp. 365 *et seq.*, and the notes thereto.

England. It was an old Saxon tenure; and continued under the Norman revolution, through the great respect that was shown to religion and religious men in ancient times. Which is also the reason that tenants in *frankalmoign* were discharged of all other services, except the *trinoda necessitas*, of repairing the highways, building castles, and repelling invasions(c): just as the Druids, among the ancient Britons, had *omnium rerum immunitatem*(d). And, even at present, this is a tenure of a nature very distinct from all others; being not in the least feudal, but merely spiritual. For, if the service be neglected, the law gives no remedy by distress or otherwise to the lord of whom the lands are holden: but merely a complaint to the ordinary or visitor to correct it(e). Wherein it materially differs from what was called *tenure by divine service*: in which the tenants were obliged to do some special divine services in certain; as, to sing so many masses, to distribute such a sum in alms, and the like; which, being expressly defined and prescribed, could with no kind of propriety be called *free alms*; especially as for this, if unperformed, the lord might distress, without any complaint to the visitor(f). All such donations are indeed now out of use: for, since the statute of *quia emptores*, 18 Edw. I., none but the king can give lands to be holden by this tenure(g). So that I only mention them, because *frankalmoign* is excepted by name in the statute of Charles II., and therefore subsists in many instances at this day. Which is all that shall be remarked concerning it; herewith concluding our observations on the nature of tenures.

Tenants in *frankalmoign* were discharged from all other services, except repairing highways, building castles, and repelling invasions.

Since the statute 18 Edw. I., none but the king can give lands to be holden by this tenure.

(c) Seld. Jan. 1, 42.

(f) Ibid. 137.

(d) Cæsar de bell. Gall. l. 6, c. 13.

(g) Ibid. 140.

(e) Litt. s. 136.

CHAPTER VII.

OF FREEHOLD ESTATES OF INHERITANCE.

Of the nature
and properties
of estates.

THE next objects of our disquisitions are the nature and properties of *estates*. An estate in lands, tenements, and hereditaments, signifies such interest as the tenant hath therein: so that, if a man grants all *his estate* in Dale to A. and his heirs, every thing that he can possibly grant shall pass thereby (*a*). It is called in Latin *status*; it signifying the condition or circumstance in which the owner stands with regard to his property. And, to ascertain this with proper precision and accuracy, estates may be considered in a threefold view: first, with regard to the *quantity of interest* which the tenant has in the tenement; secondly, with regard to the *time* at which that quantity of interest is to be enjoyed; and thirdly, with regard to the *number and connexions* of the tenants.

First, as to the
quantity of in-
terest the tenant
has.

First, with regard to the *quantity* (1) of *interest* which the tenant has in the tenement, this is measured by its duration and extent. Thus, either his right of possession is to subsist for an uncertain period, during his own life, or the life of another man; to determine at his own decease, or to remain to his descendants after him; or it is circum-

(*a*) Co. Litt. 345.

(1) The *quantity* of an estate must not be confounded with its *quality*, as if the two terms were convertible. The quantity of an estate, in technical language, is understood to mean its right of duration; as, for years, for life, in tail, or in fee. When the quality of an estate is mentioned, the conditions of

tenure, and the collateral qualifications of the interest (whether the quantity of such interest be of longer or shorter extent) are understood to be spoken of; as, whether the estate be held conditionally, in common, in joint tenancy, in co-parcenary, or under any other such modifications.

scribed within a certain number of years, months, or days : or, lastly, it is infinite and unlimited, being vested in him and his representatives for ever. And this occasions the primary division of *estates into such as are *freehold*, and such as are *less than freehold*. [* 104]

An estate of freehold (2), *liberum tenementum*, or frank-tenement, is defined by Britton (b) to be “ the possession of the soil by a freeman.” And St. Germyn (c) tells us, that “ the possession of the land is called in the law of England “ the franktenement or freehold.” Such estate, therefore, and no other, as requires actual possession of the land, is, legally speaking, *freehold* (3): which actual possession can, by the course of the common law, be only given by the ceremony called livery of seisin, which is the same as the feudal investiture. And from these principles we may extract this description of a freehold: that it is such an estate in lands as is conveyed by livery of seisin; or, in tenements of an incorporeal nature, by what is equivalent thereto. And accordingly it is laid down by Littleton (d), that, where a freehold shall pass, it behoveth to have livery of seisin. As, therefore, estates of inheritance and estates for life could not by common law be conveyed without livery of seisin, these are properly estates of freehold; and, as no other estates are conveyed with the same solemnity, therefore no others are properly freehold estates (4).

Definition of *liberum tenementum*, or an estate of freehold.

(b) C. 32.

(c) Dr. & Stud. b. 2, d. 22.

(d) S. 59.

(2) “ Tenant in fee, tenant in tail, and tenant for life, are said to have a franktenement, so called, because it doth distinguish it from terms of years, chattels upon uncertain interests, lands in villenage, or customary or copyhold lands. And note, tenant by statute-merchant, statute-staple, or *elegit*, are said to hold land *ut liberum tenementum*, until their debt be paid; and yet in truth they have no freehold, but a chattel, which shall go to the executors. But *ut* is similitudinary, because they shall by the statutes have an assise, as tenants of the freehold shall have, and in that respect their estate hath a similitude of a freehold: but *nulum simile est idem*.” (Co. Litt. 43 b.)

And see *post*, p. 387, of this volume. The writ of assise was abolished by the statute of 3 & 4 Gul. IV. c. 27.

(3) Mr. Preston’s short criterion for determining whether an estate be *freehold* or not, is as follows: “ Such interests only as may continue for the period of a life, are estates of freehold; all interests for a shorter period, or, more properly speaking, for a definite space of time, are chattel interests.” (Treat. on Est. 203.)

By livery of seisin without writing, a freehold passed at common law; but, since the statute of frauds, a freehold cannot be created without writing.

(4) Mr. Christian, in his note upon this passage, observes, that “ a free-

Of the different species of freehold estates.

F. Fee-simple—the holding by one to him and his heirs for ever.

Estates of freehold (thus understood) are either estates of *inheritance*, or estates *not of inheritance*. The former are again divided into inheritances *absolute* or fee-simple (5); and inheritances *limited*, one species of which we usually call fee-tail.

I. Tenant in fee-simple (or, as he is frequently styled, tenant in fee) is he that hath lands, tenements, or hereditaments, to hold to him and his heirs for ever (*e*): generally absolutely, and simply (6); without mentioning *what* heirs,

(*e*) Litt. s. 1.

hold estate seems to be any estate of inheritance, or for life, in either a corporeal or incorporeal hereditament, existing in, or arising from real property or free tenure; that is, now, of all which is not copyhold. And the learned judge has elsewhere informed us, that ‘tithes and spiritual dues are freehold estates, whether the lands out of which they issue are bond or free, being a separate and distinct inheritance from the lands themselves. And in this view they must be distinguished and excepted from other incorporeal hereditaments issuing out of land, as rents, &c., which in general will follow the nature of their principal, and cannot be freehold, unless the stock from which they spring be freehold also.’—1 Bl. Tracts, 116.”

[Lord Coke tells us (in 1 Inst. 1 b) that a man may have a fee simple in three kinds of hereditaments, *viz.* real, personal, or mixed; of each of which he adduces instances. And our author, two pages hence, says, “a fee, in its secondary sense, as an estate of inheritance, is applicable to, and may be had in, any kind of hereditaments, either corporeal or incorporeal.”—ED.]

(5) Before the statute *de donis conditionalibus*, there was no other estate of inheritance except a fee-simple; but estates of fee-simple were of two sorts, *viz.* fee-simple absolute, and fee-simple conditional. (*Walsingham's case*, 1 Plowd. 562; and see the next note, as also *post*, p. 109).

(6) It would save embarrassment to the student, if he never found in books of authority any estate called a fee-simple, of which the qualities did not coincide with our author's definition in the text. But, Lord Coke tells us, (1 Instit. 1 b,) “of fee-simple, it is commonly holden, that there be three kinds, *viz.* fee-simple absolute, fee-simple conditional, and fee-simple qualified, or base fee.” It is true, that Lord Coke immediately adds, “but the more apt and genuine division were to divide fee (that is, inheritance) into three parts, *viz.* simple or absolute; conditional; and qualified, or base. For, this word *simple*, properly excludeth both conditions and limitations that defeat or abridge the fee.” But, the same authority very soon informs us, (in 1 Instit. 19 a,) that “here” (that is, in the 13th sect. of Litt.) “fee-simple is taken in its large sense, including as well estates conditional or qualified, as absolute; to distinguish them from estates in tail.” And he again, more than once, alludes to a qualified fee-simple, (in 1 Instit. 27, and in 2 Instit. 333,) as he does to a determinable fee-simple in *Edward Seymour's case*. (10 Rep. 97 b.) That an estate, though determinable upon a contingency, may be a fee-simple, was also held in the case of *Pells v. Brown*, (Cro. Jac. 590,) which case was cited with approbation in *Gardner v. Sheldon*, (Vaugh. 273,) where it is distinctly laid down that “a fee-simple determinable upon a contingent, is a

but referring that to his own pleasure, or to the disposition of the law. The true meaning of the word fee (*feodum*) is the same with that of feud or fief, and in its original sense, it is *taken in contradistinction to *allodium* (*f*); which latter the writers on this subject define to be every man's own land, which he possesseth merely in his own right, without owing any rent or service to any superior. This is property in its highest degree; and the owner thereof hath *absolutum et directum dominium*, and therefore is said to be seised thereof absolutely *in dominico suo*, in his own demesne. But *feodum*, or fee, is that which is held of some superior, on condition of rendering him service; in which superior the ultimate property of the land resides. And therefore Sir Henry Spelman (*g*) defines a feud or fee to be the right which the vassal or tenant hath in lands, to *use* the same, and take the profits thereof to him and his heirs, rendering to the lord his due services; the mere allodial *property* of the soil always remaining in the lord. This allodial pro-

[* 105]

(*f*) See pp. 45, 47 [and the notes thereto].

(*g*) Of Feuds, c. 1.

fee-simple to all intents, but not so durable as absolute fee-simple. All fee-simples are *unequally* durable; for one may escheat sooner than another, by the failure of heirs. An estate to a man and his heirs, as long as John Stiles hath any heir, which is no absolute fee-simple, is doubtless as durable as the estate in fee which John Stiles hath to him and his heirs, which is an absolute fee-simple; and alienation is an incident to a fee-simple determinable upon a contingent, as to any more absolute or more perdurable fee-simple." Similar doctrines were laid down in the case of *Idle v. Cook*, (2 Ld. Raym. 1148,) and in *Vernon, v. Gatacre*. (Dyer, 252 b.) To this division of fee-simple estates, Mr. Watkins adheres in his *Princip. of Conv.* (cap. 9); and see the last preceding note.

These instances (to which it would probably be easy to add many more)

deviating, so widely, from our author's more natural classification, it seemed proper to put the student upon his guard; and to caution him, that the words fee-simple are sometimes used by legal writers of great name, and judges of high authority, merely as contrasting with estates tail; and, when so used, comprehend other fees besides fees absolute. The context will generally direct a reader whether he is to understand the word fee-simple in this looser sense, or according to the plainer meaning assigned to it by our author; and which is more conformable to the description of a fee-simple given by Fleta (lib. 3, c. 8), who says, "*Simplex donatio est, ubi nulla adjecta est conditio neque modus; simpliciter enim datur quod nullo additamento datur.*" And see Bracton (lib. 2, c. 6,) to the same effect, expressed in very similar words.

perty no subject in England has (*h*); it being a received, and now undeniable, principle in the law, that all the lands in England are holden mediately or immediately of the king (7). The king, therefore, only hath *absolutum et directum dominium* (*i*): but all subjects' lands are in the nature of *feodum* or fee: whether derived to them by descent from their ancestors, or purchased for a valuable consideration; for they cannot come to any man by either of those ways, unless accompanied with those feudal clogs which were laid upon the first feudatory when it was originally granted. A subject, therefore, hath only the usufruct, and not the absolute property of the soil; or, as Sir Edward Coke expresses it (*k*), he hath *dominium utile*, but not *dominium directum*. And hence it is, that, in the most solemn acts of law, we express the strongest and highest estate that any subject can have by these words: "he is seised thereof *in his demesne as of fee*." It is a man's demesne, *dominium*, or property, since it belongs to him and his heirs for ever: yet this *dominium*, property, or demesne, is strictly not absolute or allodial, but qualified or feudal: it is his demesne, *as of fee* (8): that is, it is not purely and simply his own, since it is held of a superior lord, in whom the ultimate property resides.

Sense of the
word *fee*.

[* 106]

*This is the primary sense and acceptation of the word *fee*. But (as Sir Martin Wright very justly observes (*l*)), the doctrine, "that all lands are holden," having been for so many ages a fixed and undeniable axiom, our English lawyers do very rarely (of late years especially) use the word *fee* in this its primary original sense, in contradistinction to *allodium* or absolute property, with which they have no concern; but generally use it to express the continuance or quantity of estate. A *fee*, therefore, in general, signifies an estate of inheritance; being the highest and most extensive interest that a man can have in a feud: and when the term is used simply, without any other adjunct, or has the

(*h*) Co. Litt. 1.

nisi Deus.—Ibid.

(*i*) *Praedium domini regis est directum dominium, cujus nullus est author*

(*k*) Co. Litt. 1.

(*l*) Of Ten. 148.

(7) See *ante*, the note to p. 51.

lum simile est idem: see *ante*, the note to p. 104.

(8) "*Ut*" is similitudinary, and *nul-*

adjunct of *simple* annexed to it (as a fee, or a fee-simple), it is used in contradistinction to a fee conditional (9) at the common law, or a fee-tail by the statute; importing an absolute inheritance, clear of any condition, limitation, or restrictions to particular heirs, but descendible to the heirs general, whether male or female, lineal or collateral. And in no other sense than this is the king said to be seised in fee, he being the feudatory of no man (*m*).

Taking, therefore, *fee* for the future, unless where otherwise explained, in this its secondary sense, as a state of inheritance, it is applicable to, and may be had in, any kind of hereditaments, either corporeal or incorporeal (*n*) (10). But there is this distinction between the two species of hereditaments; that, of a corporeal inheritance, a man shall be said to be seised *in his demesne as of fee*; of an incorporeal one, he shall only be said to be seised *as of fee*, and not in his demesne (*o*). For, as incorporeal hereditaments are in their nature collateral to, and issue out of, lands and houses (*p*), their owner hath no property, *dominium*, or demesne, in the *thing* itself, but hath only something derived out of it, resembling the *servitutes*, or services, of the civil law (*q*). The *dominium* or property is frequently *in [* 107] one man, while the appendage or service is in another. Thus Gaius may be seised *as of fee* of a way leading over the land, of which Titius is seised *in his demesne as of fee*.

The fee-simple or inheritance of lands and tenements is generally vested and resides in some person or other; though divers inferior estates may be carved out of it. As, if one grants a lease for twenty-one years, or for one or two lives, the fee-simple remains vested in him and his heirs; and, after the determination of those years or lives, the land reverts to the grantor or his heirs, who shall hold it again in fee-simple. Yet sometimes the fee may be in *abeyance* (11),

Distinction between corporeal and incorporeal hereditaments.

The fee-simple is generally vested in some person;

but sometimes it is in abeyance.

(*m*) Co. Litt. 1.

(*o*) Litt. s. 10.

(*n*) *Feodum est quod quis tenet sibi et haeredibus suis, sive sit tenementum, sive redditus, &c.* Flet. l. 5, c. 5, s. 7.

(*p*) See p. 20.

(*q*) *Servitus est jus, quo res mea alterius rei vel personae servit.* Ff. 8, l. 1.

(9) But see *ante*, p. 104, note, for some qualification of this statement.

Mr. Christian's) at the foot of p. 104.

(10) See *ante*, the last note (partly

(11) "There is no cause to frame

that is (as the word signifies) in expectation, remembrance, and contemplation in law ; there being no person in *esse*, in

abeyances needlessly and in vain, which the law loves not, nor admits, but in case of necessity, as in vacations of bishops, parsons, and the like. Abeyances are not allowed but where the original creation of estates requires them, or where the consequences of estates do in congruity require them." (*Sheffield v. Ratcliffe*, Hob. 338 ; and see *Withers v. Iseham*, Dyer, 70 b ; *Machell v. Clark*, 2 Lord Raym. 781.) Mr. Fearne (in the 6th chapter of his most valuable Essay on Contingent Remainders,) collects numerous authorities, which he employs with great effect, to prove that, although there may be no ascertained person *in esse* in whom an inheritance can vest, under a devise or grant thereof, either at common law or by way of use, it by no means follows, that the inheritance must be in abeyance ; but, on the contrary, that it remains, if not otherwise disposed of, in the heirs of the testator, or in the grantor or his heirs, until the prescribed contingency happens, which is to vest it elsewhere. Amongst other cases, he cites that of *Carter v. Barnardiston* (which is also reported in 1 P. Wms. 516,) in which Lord Chancellor Parker strongly reprobated the notion, that, when lands are devised to A. for life, remainder to the right heirs of B. *then living*, the remainder is in abeyance, or, as some call it, *in gremio legis*, or, as his lordship contemptuously said, *in nubibus*. The first instance, therefore, which our author gives in the text above, as one of supposed abeyance, is a case in which no necessity for admitting that doctrine could arise : if, by death or forfeiture in the life time of Richard, the estate of John determined, the grantor or his heir might enter.

Mr. Christian, however, seems to go rather too far, when he intimates, with

respect to the two last instances of abeyance which are noticed by our author, that "there hardly seems any necessity to resort to that doctrine, to explain the residence of the inheritance or *of the freehold*." There may be some ground for holding, that, upon the death of a parson of a church, and until the appointment of his successor, the inheritance is in the grantor and his heirs : but when Mr. Christian adds, "and the freehold seems, in fact, from the moment of the death of the parson, to vest and abide in the successor," this does not appear to be established by the reason assigned, *viz.* that, "after induction, he can recover all the right of the church which accrued from the death of the predecessor." The last position is very true (see *post*, p. 261 of this volume ;) but it can hardly prove that the freehold vested and was abiding in the successor before he was named, or perhaps thought of ; or, if this were admitted, what would become of the notion that, upon the dissolution of a corporation sole, the inheritance reverts to the grantor and his heirs ?

Our author, as Mr. Christian observes, only cites Littleton for the two instances in question ; but, at the commencement of this note, Chief Justices Hobart, Dyer, and Lord Raymond, are referred to, and will be found authorities in perfect concurrence with Littleton, and with Blackstone, that the law recognizes the doctrine of abeyance from necessity, in the cases of "vacations of bishops, parsons, and such like." Some of the judges mentioned, indeed, were disposed to go further than is now deemed necessary, and thought abeyance might be, in cases of limitations in fee to the right heirs of a person then living, after an estate of freehold. To this extent, we have seen, their doctrine

whom it can vest and abide: though the law considers it as always potentially existing, and ready to vest whenever a proper owner appears. Thus, in a grant to John for life, and afterwards to the heirs of Richard, the inheritance is plainly neither granted to John nor Richard, nor can it vest in the heirs of Richard till his death, *nam nemo est haeres viventis*: it remains, therefore, in waiting or abeyance, during the life of Richard (*r*). This is likewise always the case of a parson of a church, who hath only an estate therein for the term of his life; and the inheritance remains in abeyance (*s*). And not only the fee, but the freehold also, may be in abeyance; as, when a parson dies, the freehold of his glebe is in abeyance until a successor be named, and then it vests in the successor (*t*).

The word "heirs" is necessary in the grant or donation, in order to make a fee, or inheritance. For, if land be given to a man for ever, or to him and his assigns for ever, this vests in him but an estate for life (*u*). This very great nicety about the insertion of the word "heirs" in all feoffments and grants, in order to vest a fee, is plainly a relic of the feudal strictness; by which, we may remember (*w*), it was required *that the form of the donation should be punctually pursued; or that, as Cragg (*x*) expresses it, in the words of Baldus, "*donationes sint stricti juris, ne quis plus donasse praesumatur quam in donatione expresserit.*" And therefore, as the personal abilities of the donee were originally supposed to be the only inducements to the gift, the donee's estate in the land extended only to his own person, and subsisted no longer than his life; unless the donor, by an express provision in the grant, gave it a longer continuance, and extended it also to his heirs. But this rule is now softened by many exceptions (*y*).

To make a fee, the word "heirs" is necessary in the grant.

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For, 1. It does not extend to devises by will (12); in

But this strictness is not required in wills;

(*r*) Co. Litt. 342.

(*w*) See page 56.

(*s*) Litt. s. 646.

(*x*) L. 1, t. 9, s. 17.

(*t*) Ibid. s. 647.

(*y*) Co. Litt. 9, 10.

(*u*) Ibid. s. 1.

has been repudiated; but, it is believed, no further.

(12) See *post*, the 23rd chapter of this volume, p. 380, and note thereto. Lord Coke teaches us (1 Inst. 322 b)

that it was the maxim of the common law, and not, as has been sometimes said (*Idle v. Cook*, 1 P. Wms. 77), a principle arising out of the wording of the statutes of wills (32 Hen. VIII.

which, as they were introduced at the time when the feudal rigour was apace wearing out, a more liberal construction is

c. 1, 34 Hen. VIII. c. 5,) "*quod ultima voluntas testatoris est perimplenda, secundum veram intentionem suam.*" For this reason, Littleton says, (sect. 586,) if a man deviseth tenements to another, *habendum in perpetuum*, the devisee taketh a fee simple; yet, if a deed of feoffment had been made to him by the devisor of the said tenements, *habendum sibi in perpetuum*, he should have an estate but for term of his life, for want of the word *heirs*. In *Webb v. Herring*, (1 Rolle's Rep. 399,) it was determined, that a devise to a man and his successors, gives a fee. But, whether a devise to a man and his posterity would give an estate tail, or a fee, was doubted in the *Attorney General v. Bamfield*. (2 Freem. 268.) Under a devise to a legatee, "for her own use, and to give away at her death to whom she pleases," Mr. Justice Fortescue said, there was no doubt a fee passed: (*Timewell v. Perkins*, 2 Atk. 103 :) and the same doctrine was held in *Goodtitle v. Otway*. (2 Wils. 7; see also *infra*.) And a devise of the testator's lands and tenements to his executors, "freely to be possessed and enjoyed by them alike," was held, (in *Loveacres v. Blight*, Cowp. 357,) to carry the fee: for, the testator had charged the estate with the payment of an annuity, which negatived the idea, that, by the word *freely* he only meant to give the estate *free of incumbrances*: the free enjoyment, therefore, it was held, must mean, free from all limitations. But, if the testator had not put any charge on the estate, this would not have been the necessary construction; nor would so extended a meaning have been given to those words against the heir, in any case where it was not certain that the testator meant more than that his devisee should possess and enjoy the

estate, *free from all charges, or free from impeachment of waste*. (*Goodright v. Barron*, 11 East, 224.)

Thus, if a man devises all his freehold estate to his wife, *during her natural life*, and also *at her disposal afterwards, to leave it to whom she pleases*, the word *leave* confines the authority of the devisee for life to a disposition by will only. (*Doe v. Thorley*, 16 East, 443; and see *infra*.) This, it will at once be obvious, is by no means inconsistent with what was laid down in *Timewell v. Perkins*, as before cited. The distinction is pointed out in *Tomlinson v. Dighton*, (1 P. Wms. 171,) thus: where a power is given, with a particular description and limitation of the estate devised to the donee of the power, the power is a distinct gift, coming in by way of addition, but will not enlarge the estate expressly given to the devisee; though, when the devise is general and indefinite, with a power to dispose of the fee, there the devisee himself takes the fee. In some few instances, indeed, courts of equity have inclined to consider a right of enjoyment for life, coupled with a power of appointment, as equivalent to the absolute property. (*Standen v. Standen*, 2 Ves. Junr. 594.) A difference, however, seems now to be firmly established, not so much with regard to the party possessing a power of disposal, as out of consideration for those parties whose interests depend upon the non-execution of that power. (*Croft v. Slee*, 4 Ves. 64.) Confining the attention to the former, there may be no reason why that which he has power to dispose of should not be considered as his property; but the interests of the latter ought not to be affected in any other manner than that specified at the creation of the power. (*Holmes v. Coghill*,

allowed; and therefore by a devise to a man for ever, or to one and his assigns for ever, or to one in fee-simple, the

7 Ves. 506; *Jones v. Curry*, 1 Swanst. 73; *Reid v. Shergold*, 10 Ves. 383.) When, therefore, a devise or bequest (for the principle seems to apply equally to realty as to personalty) is made to any one expressly for life, with a power of appointment, by will only, superadded, that power (as already has been intimated) must be executed in the manner prescribed; for, the property not being absolute in the first taker, the objects of the power cannot take without a formal appointment; but, where the devise or bequest is made indefinitely, with a superadded power to dispose by will or deed, the property (as we have seen) vests absolutely. The distinction may, perhaps, seem slight, but it has been judicially declared to be perfectly settled. (*Bradley v. Westcott*, 13 Ves. 453; *Anderson v. Dawson*, 15 Ves. 536; *Barford v. Street*, 16 Ves. 139; *Nannock v. Horton*, 7 Ves. 398; *Irwin v. Farrer*, 19 Ves. 87.) Where an estate is devised absolutely, without any prior estate limited to such uses as a person shall appoint, that is an estate in fee. (*Langham v. Nenny*, 3 Ves. 470.) And the word "estate," when used by a testator, and not restrained to a narrower signification by the context of the will, (*Doe v. Hurrell*, 5 Barn. & Ald. 21,) is sufficient to carry real estate; (*Barnes v. Patch*, 8 Ves. 608; *Woollam v. Kenworthy*, 9 Ves. 142;) and that not merely a life interest therein, but the fee, although no words of limitation in perpetuity are added. (*Roe v. Wright*, 7 East, 268; *Right v. Sidebotham*, 2 Dougl. 763; *Chorlton v. Taylor*, 3 Ves. and Bea. 163; *Pettiward v. Prescott*, 7 Ves. 545; *Nicholls v. Butcher*, 18 Ves. 195.) So, the word "property" may bear the same extensive construction. (*Thomas v. Phelps*, 4 Russ. 351; *Doe v. Tucker*, 3 Barn.

& Adol. 477; *Wilce v. Wilce*, 7 Bing. 672; 5 Moo. & P. 682.) And although the mere introductory words of a will, intimating in general terms the testator's intention to dispose of "all his estate, real and personal," will not of themselves pass a fee, if the will, in its operative clauses, contains no further declaration of such intent; still, where the subsequent clauses of devise are inexplicit, the introductory words will have an effect on the construction, as affording some indication of the testator's intention. (*Ibbetson v. Beckwith*, Ca. temp. Talb. 160; *Goodright v. Stocker*, 5 T. R. 13; *Doe v. Buckner*, 6 T. R. 612; *Gulliver v. Poyntz*, 3 Wils. 143; *Smith v. Coffin*, 2 H. Bla. 450.) But, though slight circumstances may be admitted to explain obscurities, (*Randall v. Morgan*, 12 Ves. 77,) and words may be enlarged, abridged, or transposed, in order to reach the testator's meaning, when such liberties are necessary to make the will consistent; (*Keiley v. Fowler*, Wilm. Notes, 309;) still, no operative and effective clause in a will must be controlled by ambiguous words occurring in the introductory parts of it, unless this is absolutely necessary in order to furnish a reasonable interpretation of the whole: (*Lord Oxford v. Churchill*, 3 Ves. & Bea. 67; *Hampson v. Brandwood*, 1 Mad. 388; *Leigh v. Norbury*, 13 Ves. 344; *Doe v. Pearce*, 1 Pr. 365;) neither can a subsequent clause of limitation as to one subject of devise, be governed by words of introduction which, though clear, are not properly applicable to that particular subject; (*Nash v. Smith*, 17 Ves. 33; *Doe v. Clayton*, 8 East, 144; *Denn v. Gaskin*, Cowp. 661;) whilst, on the other hand, an express disposition in an early part of a will must not receive an exposition from

devisee hath an estate of inheritance; for the intention of the devisor is sufficiently plain from the words of perpetuity

a subsequent passage, affording only a conjectural inference. (*Roach v. Haynes*, 8 Ves. 590; *Barker v. Lea*, 3 Ves. & Bea. 117; *S. C.* 1 Turn. & Russ. 416; *Jones v. Colbeck*, 8 Ves. 42; *Parsons v. Baker*, 18 Ves. 478; *Thackeray v. Hampson*, 2 Sim. & Stu. 217.)

Where an estate is devised, and the devisee is subjected to a charge, which charge is not directed to be paid out of the rents and profits, the devise will carry a fee-simple, notwithstanding the testator has added no words of express limitation in perpetuity. Upon this point, the distinction is settled, that, where the charge is on the person to whom the land is devised (in general terms, not where he has an estate-tail given him, *Denn v. Slater*, 5 T. R. 337,) there he must take the fee; but not where the charge is upon the land devised, and payable out of it. And the reason given, why in the former case the devisee must take the fee, is, because otherwise the estate may not be sufficient to pay the charge during the life of the devisee, which would make him a loser, and that could not have been the intention of the devisor. (*Goodtitle v. Maddern*, 4 East, 500; *Doe v. Holmes*, 8 T. R. 1; *Doe v. Clarke*, 2 New Rep. 349; *Roe v. Daw*, 3 Mau. & Sel. 522; *Baddeley v. Leapingwell*, Wilm. Notes, 235; *Collier's case*, 6 Rep. 16.)

With regard to the operation of the word "hereditaments" in a will, Mr. Justice Buller said, there have been various opinions; in some cases it has been held to pass a fee, in others not; (*Doe v. Richards*, 3 T. R. 360;) but the latter construction seems now to be firmly established as the true one. The settled sense of the word "hereditaments," Chief Baron Macdonald declared, (in *Moore v. Denn*, 2 Bos. & Pull. 251,) is, to denote such things

as may be the subject matter of inheritance, but not the inheritance itself; and cannot, therefore, by its own intrinsic force, enlarge an estate which is *prima facie* a life estate, into a fee. It may have weight, under particular circumstances, in explaining the other expressions in a will, from whence it may be collected, in a manner agreeable to the rules of law, that the testator intended to give a fee: but in *Canning v. Canning*, (Mosely, 242,) it was considered as quite settled by the decision in *Hopewell v. Ackland* (1 Salk. 239,) that a fee will not pass merely by the use of the word hereditament. (And see the same case of *Denn v. Moore*, in its previous stages of litigation, 3 Anstr. 787; 5 T. R. 563; as also *Pocock v. The Bishop of London*, 3 Brod. & Bing. 33.)

Mr. Preston (in page 42 of the 2nd volume of his Treat. of Est.) observes, the rule requiring the designation in terms, or by reference, of *heirs* in the limitation of estates, is confined, even with respect to common law assurances, to those cases in which the assurances are to *natural* persons; the rule does not take place where the assurances are made to corporations; or are made by matter of record; or operate only to extinguish a right, or a *collateral* interest; or which give one interest in lieu of another; or release the unity of title; or confer an equitable interest by way of contract, as distinguished from a conveyance. These, and other instances, as well as those of wills, to which the rule does not extend, he says, are more properly to be considered as not coming within the scope of the rule, or of the policy of the law which was the foundation of the rule, than as exceptions to the rule: and he devotes the greater part of the remainder of the volume cited to a collection and

annexed, though he hath omitted the legal words of inheritance. But, if the devise be to a man and his assigns, without annexing words of perpetuity, there the devisee shall take only an estate for life; for it does not appear that the devisor intended any more. 2. Neither does this rule extend to fines or recoveries (13), considered as a species of conveyance; for thereby an estate in fee passes by act and operation of law without the word "heirs:" as it does also, for particular reasons, by certain other methods of conveyance, which have relation to a former grant or estate, wherein the word "heirs" was expressed (z). 3. In creations of nobility by writ, the peer so created hath an inheritance in his title, without expressing the word "heirs;" for heirship is implied in the creation, unless it be otherwise specially provided: but, in creations by patent, which are *stricti juris*, the word "heirs" must be inserted, otherwise there is no inheritance. 4. In grants of lands to sole corporations and their successors, the word "successors" supplies the place of "heirs;" for, as heirs take from the ancestor, so doth the successor from the predecessor. Nay, in *a grant to a bishop, or other sole spiritual corporation, in *frankalmoign*, the word "*frankalmoign*" supplies the place of "successors," (as the word "successors" supplies the place of "heirs,") *ex vi termini*; and, in all these cases, a fee-simple vests in such sole corporation. But, in a grant of lands to a corporation aggregate, the word "successors" is not necessary, though usually inserted: for, albeit such simple grant be strictly only an estate for life, yet, as that corporation never dies, such estate for life is perpetual, or equivalent to a fee-simple, and therefore the law allows it to be one (a). 5. Lastly, in the case of the king, a fee-simple will vest in him, without the word "heirs" or "successors" in the grant; partly from prerogative royal, and partly from a reason similar to the last, because the king in judg-

nor in fines or recoveries;

nor in creations of nobility by writ—*aliter*, by patent.

In grants to corporations, the word "successors" supplies the place of "heirs."

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A fee-simple will vest in the king without either the words "heirs" or "successors" in the grant.

(z) Co. Litt. 9.

(a) See Vol. I. p. 484.

illustration of the different classes of cases in which a fee has been held to pass, though the word "heirs" has not been used. To this ample storehouse of materials, the reader who wishes to examine the subject more

at length is referred.

(13) Nor, it is presumed, to the more simple modes of assurance substituted in the room of fines and recoveries, by the stat. of 3 & 4 Gul. IV. c. 74.

ment of law never dies (*b*). But the general rule is, that the word "heirs" is necessary to create an estate of inheritance.

II. Of limited fees—

1. *Qualified* or *base* fees ;

2. Fees *conditional* ;

3. Fees *tail*.

1. A base or qualified fee is one having a qualification subjoined to it, or of which the duration depends on collateral circumstances.

II. We are next to consider limited fees, or such estates of inheritance as are clogged and confined with conditions, or qualifications (14), of any sort. And these we may divide into two sorts : 1. *Qualified*, or *base* fees ; and 2. Fees *conditional*, so called at the common law ; and afterwards fees-*tail*, in consequence of the statute *de donis*.

1. A base, or qualified fee, is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. As, in the case of a grant to A. and his heirs, *tenants of the manor of Dale* ; in this instance, whenever the heirs of A. cease to be tenants of that manor, the grant is entirely defeated. So, when Henry VI. granted to John Talbot, lord of the manor of Kingston-Lisle in Berks, that he and his heirs, lords of the said manor, should be peers of the realm, by the title of barons of Lisle ; here, John Talbot had a base or qualified fee in that dignity (*c*), and, the instant he or his heirs quitted the seignory of this manor, the dignity was at an end. This (15) *estate is a fee, because by possibility it may endure for ever in a man and his heirs : yet, as that duration depends upon the concurrence of collateral circumstances which qualify and debase the purity of the donation, it is therefore a qualified or base fee.

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2. A *conditional* fee, at common law, was a fee restrained to some particular heirs.

2. A conditional fee, at the common law, was a fee restrained to some particular heirs, exclusive of others : "*do-*" "*natio stricta et coarctata* (*d*) ; *sicut certis haeredibus*, "*quibusdam a successione exclusis*:" as to the heirs of a man's body by which only his lineal descendants were admitted, in exclusion of collateral heirs ; or to the heirs *male of his body*, in exclusion both of collaterals, and lineal females also. It was called a conditional fee, by reason of

(*b*) See Vol. I. p. 249.

(*c*) Co. Litt. 27.

(*d*) Flet. l. 3, c. 3, s. 5.

(14) See *ante*, p. 104, note.

(15) The proprietor of a qualified or base fee has the same rights and privileges over his estate, till the con-

tingency upon which it is limited occurs, as if he were tenant in fee-simple. (*Walsingham's case*, Plowd. 557.)

the condition expressed or implied in the donation of it, that, if the donee died without such particular heirs, the land should revert to the donor. For this was a condition annexed by law to all grants whatsoever; that, on failure of the heirs specified in the grant, the grant should be at an end, and the land return to its ancient proprietor (*e*). Such conditional fees were strictly agreeable to the nature of feuds (16), when they first ceased to be mere estates for life, and were not yet arrived to be absolute estates in fee-simple. And we find strong traces of these limited, conditional fees, which could not be alienated from the lineage of the first purchaser, in our earliest Saxon laws (*f*).

Now, with regard to the condition annexed to these fees by the common law, our ancestors held, that such a gift, (to a man and the heirs of his body) was a gift upon condition, that it should revert to the donor, if the donee had no heirs of his body; but, if he had, it should then remain to the donee. They therefore called it a fee-simple, on condition that he had issue (17). Now we must observe, that, when

(*e*) Plowd. 241.

(*f*) *Si quis terram hæreditariam habeat, eam non vendat a cognatis hæ-*

redibus suis, si illi viro prohibitum sit, qui eam ab initio acquisivit, ut ita facere nequeat. LL. Ælfred, c. 37.

(16) A *feudum talliatum* is thus described by Du Cange (*Gloss. ad vocem "feudum."*) *Feudum talliatum dicitur, verbis forensibus, hæreditas in quamdam certitudinem limitata: seu feudum certis conditionibus concessum.* The conditional fees recognized by our common law, as well as our fees-tail since the statute *de donis conditionalibus*, were, in all probability, derived from *feuda talliata*. As Glanville makes no mention of conditional fees in his accurate work on our laws as they existed in his days, (that is, in the reign of Henry II.,) we may conclude they were not then known; but Bracton, who wrote in the reign of Henry III. describes them very clearly, and as forms of donation then become familiar. He says (in book 2, c. 6,) *ita coarctari poterunt hæredes per modum donationis, quod omnes hæredes generaliter ad succes-*

sionem non vocantur. . . . quo casu, cum certi hæredes exprimuntur in donatione, videri poterit quod tantum sit descensus ad hæredes per modum in donatione appositum; omnibus aliis hæredibus a successione penitus exclusis, quia hoc voluit donator. We may conclude, therefore, that these limited donations were brought into common use, either at the close of the reign of Henry II. or during the reigns of Richard I. or of John.

(17) In the great case of *Willion v. Berkley*, (Plowd. 233,) Lord C. J. Dyer said, upon the grant of a conditional fee, the fee-simple vested at the beginning; by having issue, the donee acquired power to alien, which he had not before, but the issue was not the cause of his having the fee, the first gift vested that: and (in p. 235 of S. C.) it was said, when land was given (before the statute *de donis*) to a man

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and, when the

any condition is performed, it is thenceforth entirely gone ; and the thing to which it was before annexed, becomes absolute, *and wholly unconditional (18). So that, as soon as

and the heirs of his body, this was a fee-simple, with a condition annexed, that, if the donee died without such heirs, the land should revert to the donor ; to whom, therefore, the common law gave a *formedon in reverter*. But he was not entitled to a writ of *formedon in remainder*, for no remainder could be limited upon such an estate, which, though determinable, was considered a fee-simple, until the statute *de donis* was made : since the statute we call that an estate-tail, which before was a conditional fee ; (Ibid. p. 239 ;) and whilst it continued so, if the donee had issue, he had power to alienate the fee, and to bar not only the succession of his issue, but the reversion of the donor in case his issue subsequently failed. To redress which evils (as they were thought to be), the act *de donis conditionalibus* was made. (Ibid. p. 242, 245.)

(18) Where the person to whom a conditional fee was limited had issue, and suffered it to descend to such issue, they might alien it. But, if they did not alien, the donor would still have been entitled to his right of reverter ; for, the estate would have continued subject to the limitations contained in the original donation. (*Nevil's case*, 7 Rep. 124 ; *Willion v. Berkley*, Plowd. 247.) This authority supports the statement of our author, to a similiar effect, lower down in the page ; but it hardly authorises the assertion, that after issue, the estate became wholly unconditional. (See *post*, the first note to p. 112.) Bracton (lib. 2, c. 6) says, "*Si do tali, habendum et tenendum sibi et hæredibus suis de carne talis exeuntibus, eo casu, cum certi hæredes exprimantur in donatione, quousque tales inceperint hæredes esse, est liberum tenementum, cum autem inceperint hæredes, incipit*

liberum tenementum esse feodum, et cum desierint esse, desinit esse feodum, et incipit esse liberum tenementum, et ita ibi nunquam erit dotis exactio."

And, in *Paine's case*, (8 Rep. 71) it is distinctly laid down that, "after issue had, the tenant in tail at the common law had *not* such a fee-simple that his collateral heir should inherit."

In the preceding page of the same case, it is said, "at the common law, after issue, it was taken, to three purposes, that the tenant in tail had a full fee-simple : 1. To alien ; 2. To forfeit it by attainder ; so that, although the tenant in tail afterwards died without issue, the land should not revert to the donor ; 3. That in the case of a woman tenant in *special* tail, if she once had such special issue, the lands were descendible to other issue than those pointed out by the grant ; for, as by alienation the donee might have made strangers to her blood absolutely inheritable ; so, by construction of law, after the special issue had, all lineal issues of her body, by whatsoever husband they were begotten, should inherit, as a benefit and incident *tacite* annexed to her estate by the law : for, by having issue, the husband is entitled to his curtesy in the lands, which disposition and *alteration of the estate*, although it be for life, *tacite*, as an incident to it, make the issue of the second husband inheritable." (And see *Willion v. Berkley*, Plowd. 246.) In *Paine's case* (*ubi supra*), it is also said, when, before the statute *de donis*, land was given to husband and wife, and the heirs of *their two bodies*, and they had issue, and the wife died, the second wife of the husband would be entitled to her dower, and his issue *by her* would, consequently, be capable of inheriting the land.

the grantee had any issue born, his estate was supposed to become absolute, by the performance of the condition ; at least, for these three purposes : 1. To enable the tenant to aliene the land, and thereby to bar not only his own issue, but also the donor of his interest in the reversion (*g*). 2. To subject him to forfeit it for treason ; which he could not do, till issue born, longer than for his own life ; lest thereby the inheritance of the issue, and reversion of the donor, might have been defeated (*h*). 3. To empower him to charge the land with rents, commons, and certain other incumbrances, so as to bind his issue (*i*). And this was thought the more reasonable, because, by the birth of issue, the possibility of the donor's reversion was rendered more distant and precarious : and *his* interest seems to have been the only one which the law, as it then stood, was solicitous to protect ; without much regard to the right of succession intended to be vested in the issue. However, if the tenant did not in fact aliene the land, the course of descent was not altered by this performance of the condition ; for if the issue had afterwards died, and then the tenant, or original grantee, had died, without making any alienation ; the land, by the terms of the donation, could descend to none but the heirs *of his body*, and therefore, in default of them, must have reverted to the donor (19). For which reason, in order to subject the lands to the ordinary course of descent, the donees of these conditional fee-simples took care to aliene as soon as they had performed the condition by having issue ; and afterwards repurchased the lands, which gave them a fee-simple absolute, that would descend to the heirs general, according to the course of the common law. And thus stood the old law with regard to conditional fees : which things, says Sir Edward Coke (*k*), though they seem ancient, are yet necessary to be known ; as well for the declaring how the common law stood in such cases, as for the sake of annuities, and such like inheritances, as are not within the

grantee had issue born, the estate became absolute, to a certain extent.

(*g*) Co. Litt. 19 ; 2 Inst. 233.

(*i*) Co. Litt. 19.

(*h*) Co. Litt. *ibid.* ; 2 Inst. 234.

(*k*) 1 Inst. 19.

(19) As to the qualification of this right of reverter, in cases of special tail, although the conditions of gift were not literally fulfilled, see the last note.

statutes of entail, and therefore remain as at the common law (20).

[* 112]

The statute *de donis*.

*The inconveniences, which attended these limited and fettered inheritances, were probably what induced the judges to give way to this subtle finesse of construction, (for such it undoubtedly was,) in order to shorten the duration of these conditional estates. But, on the other hand, the nobility, who were willing to perpetuate their possessions in their own families, to put a stop to this practice, procured the statute of Westminster the second (*l*) (commonly called the statute *de donis conditionalibus*) to be made; which paid a greater regard to the private will and intentions of the donor, than to the propriety of such intentions, or any public considerations whatsoever. This statute revived in some sort the ancient feudal restraints which were originally laid on alienations, by enacting, that from thenceforth the will of the donor be observed; and that the tenements so given (to a man and the heirs of his body) should at all events go to the issue, if there were any; or, if none, should revert to the donor.

Upon the construction of which it was held that the donee acquired an absolute fee, which was called a *fee-tail*.

Upon the construction of this act of parliament, the judges determined that the donee had no longer a conditional fee-simple, which became absolute (21) and at his own disposal, the instant any issue was born; but they divided the estate into two parts, leaving in the donee a new kind of particular estate, which they denominated a *fee-tail* (*m*) (21); and investing in the donor the ultimate fee-simple of the land,

(*l*) 13 Edw. I. c. 1.

(*m*) The expression *fee-tail*, or *feodum talliatum*, was borrowed from the feudists; (see Crag. l. 1, t. 10, s. 24, 25;) among whom it signified any mutilated or truncated inheritance, from

which the heirs general were *cut* off; being derived from the barbarous verb *taliare*, to cut; from which the French *tailler* and the Italian *tagliare* are formed. (Spelm. Gloss. 531.)

(20) See page 113 of the text.

(21) A conditional fee might have been disposed of by the donee after he had issue born, and during the life of the donee; but if the issue died before the alienation of the fee, the donee could not alien, nor would the subsequent birth of issue confirm the validity of a prior alienation. (*Nevil's case*, 7 Rep. 125; *Willion v. Berkley*,

Plowd. 235 b.) Whenever, therefore, it is said, that the instant issue was born a conditional fee became *absolute*, it must be understood, not that it was *ipso facto* absolute, (for that is expressly denied in *Nevil's case*, 7 Rep. 125,) but that it was capable of being made so. (And see *ante*, note (18), p. 111.)

(22) See *ante*, note (16), p. 110.

expectant on the failure of issue; which expectant estate is what we now call a reversion (*n*) (23). And hence it is that Littleton tells us (*o*), that tenant in fee-tail is by virtue of the statute of Westminster the second.

Having thus shown the *original* of estates-tail, I now proceed to consider, *what things* may, or may not, be entailed *under the statute *de donis*. *Tenements* (24) is the only word used in the statute: and this Sir Edward Coke (*p*) expounds to comprehend all corporeal hereditaments (25) whatsoever; and also all incorporeal hereditaments, which savour of the realty, that is, which issue out of corporeal ones, or which concern, or are annexed to, or may be exercised within the same; as, rents (26), estovers (27), commons (28), and the like. Also offices (29) and dignities (30), which concern lands, or have relation to fixed and certain places, may be entailed (*q*). But mere personal chattels, which savour not at all of the realty, cannot be entailed. Neither can an office, which merely relates to such personal chattels; nor an annuity (31), which charges only the person, and not the lands of the grantor. But in these last, if granted to a man and the heirs of his body, the grantee hath still a fee-conditional at common law, as before the statute; and by his alienation (after issue born) may bar the heir or reversioner (*r*) (32). An estate to a man and his

What may or may not be entailed, under the statute *de donis*.

[* 113]

(*n*) 2 Inst. 335.

(*o*) Sec. 13.

(*p*) 1 Inst. 19, 20.

(*q*) 7 Rep. 33.

(*r*) Co. Litt. 19, 20.

(23) Before the statute *de donis*, no reversion, strictly speaking, remained in the donor, after he had created a conditional fee; he had only a *possibility* of reversion, not an *actual estate* in reversion. But, after the statute, an estate given to a man and the heirs of his body, was held to be only a particular estate, leaving the fee-simple as an estate in reversion in the donor. (*Willion v. Berkley*, 1 Plowd. 248 a; Co. Litt. 22 b.)

(24) See *ante*, pp. 16, 59, and notes.

(25) See *ante*, p. 17, and note.

(26) See *ante*, p. 41, and the notes thereto.

(27) See *ante*, p. 34, and note.

(28) See *ante*, p. 32, and the notes thereto.

(29) See *ante*, p. 36, and the notes thereto.

(30) See *ante*, p. 37, and the note thereto.

(31) See *ante*, pp. 16, 40, with the notes thereto: as also the next note here following.

(32) See *ante*, the notes to pp. 111, 112. An annuity when granted with words of inheritance, is descendible. It may be granted in fee: of course it may as a qualified or conditional fee; but it cannot be entailed, for it is not within the statute *de donis*; and,

heirs for another's life cannot be entailed(s): for this is

(s) 2 Vern. 225.

consequently, it has been held, there can be no remainder limited upon such a grant: but it seems there may be a limitation by way of executory devise, provided that is within the prescribed limits, and does not tend to a perpetuity. An annuity may be granted as a fee-simple conditional; but then, it must end or become absolute, in the life of a particularized person. (*Turner v. Turner*, 1 Br. 325; *S. C. Ambl.* 782; *Earl of Stafford v. Buckley*, 2 Ves. sen. 180.) An annuity granted to one, and the heirs male of his body, being a grant not coming within the statute *de donis*, all the rules applicable to conditional fees at common law still hold, with respect to such a grant. (*Nevil's case*, 7 Rep. 125.) As to the nature of those rules, see the references given at the commencement of this note.

Mr. Preston, (in the 1st volume of his *Essay on Abstracts*, p. 379,) observes, "Lord Hardwicke seems to have been surprised into a mistake, when (in the case of *Earl of Stafford v. Buckley*, 2 Ves. sen. 180,) he supposed that there could not have been any remainder at the common law, after a gift to a man and the heirs of his body." If Lord Hardwicke was mistaken, it does not appear, however, that he was taken by surprise; for he came to his conclusion upon deliberately formed reasons: in the soundness of which Lord Loughborough concurred, in the case of *Turner v. Turner* (before cited). The ground upon which these opinions were avowedly rested was this: A grant to a man, and the heirs of his body, was a conditional fee at the common law, (*Wooddeson*, 19 Vin. Lect. vol. 2, p. 9,) and though it left a possibility of reverter in the donor, it left no actual estate in reversion in him: (see *ante*, note (23) to p. 112:)

therefore, wherever a fee, though a qualified or base one, was granted, the judges mentioned thought it clear that no remainder could, at common law, be limited upon such grant. (*Edward Seymour's case*, 10 Rep. 97 a; *Willion v. Berkley*, Plowd. 248 a; *Co. Litt.* 18 a; 1 Eq. Ca. Ab. 186; 2 Inst. 336; Mr. Butler's note to *Fearne*, C. R. p. 13; 1 Roberts on Wills, 5; *Machell v. Clarke*, *Ld. Raym.* 779; *Pells v. Brown*, *Palm.* 138.)

Lord Hardwicke and Lord Loughborough, as will be seen on reference to the cases observed upon as decided by them, were both speaking of annuities; and, of course, their words are to be restricted, if any restriction is necessary, so as to be understood *secundum subjectam materiam*. Now Mr. Preston himself tells us, (1 Treat. on Est. 477,) "this estate" (he is speaking of a conditional fee,) "may arise from a gift to a man or a woman, and the heirs of the body of the donee of an hereditament which is not a tenement, and therefore not within the statute *de donis*. Annuities, not being rent charges, are of this description." (See *ante*, p. 16, n.) Again, (in p. 484,) he says, "even on the conveyance of a determinable or qualified fee, the entire property is transferred to the person to whom the conveyance is made, though there may be a possibility of reverter. Hence the maxim of the common law, that *no estate may be limited in remainder of a fee simple*." He then remarks upon the doubt expressed by Ch. J. Vaughan, (in *Gardner v. Sheldon*, *Vaugh.* 269,) as to the correctness of Lord Coke's statement (in 1 Inst. 18,) that "if land be given to H. and his heirs so long as B. hath heirs of his body, remainder in fee, the remainder is void;" and on this

strictly no estate of inheritance, (as will appear here-

doubt (which is declared in note 9 to 2 Saund. 388 b, to be groundless,) Mr. Preston remarks, "there frequently occur in our books on the law, prior to the statute *de donis*, limitations of remainders after gifts of conditional, being also qualified, fees." At the foot of the page (485) in which this remark appears, *Winchester's case* (3 Rep. 3 b) is candidly referred to, where it was laid down, that "he who has a remainder expectant upon an estate tail, shall have a writ of error upon false judgment given against tenant in tail, although there was *no such remainder at the common law*; for, when the statute *de donis conditionalibus* doth enable the donor to limit a remainder upon an estate tail, all actions which are necessary incidents are *tacite* given also." The reference given to Fitz. N. B., *on formedons*, (if the present writer has not been inaccurate in his examination,) contains nothing in support of C. J. Vaughan's doubt; whilst the 2nd Inst. (which is also referred to) contains (in p. 336,) a very distinct statement, which, if admitted, goes to the complete removal of that doubt. It is there said, "The formedon *in reverter* did lie at the common law, but *not* a formedon *in remainder upon an estate tail*; because it was a fee simple conditional, *whereupon no remainder could be limited at the common law*, but since this statute *de donis*, a remainder may be limited upon an estate tail." Mr. Preston's remaining reference is to Bracton (fol. 13,) being part of the 6th chapter of his 2nd book; the whole of which chapter is devoted to the distinction between simple or absolute, and conditional or qualified donations; but in which it does not appear to the present writer that any conclusive grounds for Chief Justice Vaughan's *doubt* can be found. Brac-

ton certainly says, "*fieri potest donatio, viro et uxori et hæredibus communibus, si tales extiterint, vel si non extiterint, tunc ejus hæredibus qui alium supervixerit.*" And subsequently he adds, "*item poterit pluribus fieri donatio, per modum, simul et successive, ut si quis plures habeat filios, et dicat, do A., primogenito filio meo, tantam terram habendam sibi et hæredibus suis de corpore suo procreatis, et si tales hæredes non habuerit, vel habuerit et defecerint, tunc terram illam do B., filio meo postgenito, habendum sibi et hæredibus suis de corpore suo procreatis, et si tales hæredes non habuerit,*" &c.—then to his other children in like manner. But, these co-existing grants in the alternative, made "*per modum, simul et successive,*" do not seem to answer any of the usually received definitions of a remainder; (see *post*, p. 165 of this volume;) and which, as will be seen in a subsequent part of this note, have been approved and adopted by Mr. Preston himself.

And in p. 486, of his Tr. on Est. Mr. Preston seems to vary not a little from the terms he used in his Ess. on Abst. when speaking of the *dictum* of Lord Hardwicke, in the case of the *Earl of Stafford v. Buckley*, instead of intimating that it was a hasty *mistake*, he speaks of it as an *admission* (and apparently as a just admission,) of the great Judge named, that no remainder could be created of any estate not within the statute *de donis*. Mr. Preston even goes further, he doubts the validity of the limitations above cited from Bracton, (and which have been copied from him by Reeves, 1 Hist. of Eng. L. 295,) observing that, although "the practice of limiting copyhold lands to one and the heirs of his body, and afterwards to another person," (which however seems a very different limitation from

after (33),) and therefore not within the statute *de donis*.

a grant in the alternative to several, *per modum, simul et successive*,) “seems to afford an argument in support of the doctrine mentioned in Reeves: this particular instance of copyholds, is generally, and perhaps most correctly, referred to the assimilation of property, to put the limitations of freehold and copyhold lands on the same footing, notwithstanding freeholds alone were the express object of the statute of entails.” (See *Haydon’s case*, 3 Rep. 8, 9; *Rowden v. Malster*, Cro. Car. 44; *Moore v. Moore*, 2 Ves. sen. 601, 606; *Everall v. Smalley*, 1 Wils. 27; *Doe v. Truby*, 2 W. Bla. 946.)

That, under the doctrine of executory devises, whatever shall remain after the determination of a fee, (within the space of a life or lives in being at the time of the testator’s decease, or twenty-one years afterwards,) may be the subject of an executory devise, though it cannot be taken as a remainder, is now settled: (*Gardner v. Sheldon*, Vaugh. 270; *Pells v. Brown*, Cro. Jac. 591; *Roe v. Jaffery*, 7 T. R. 596 :) but Mr. Serjeant Williams, (in his note to *Purefoy v. Rogers*, 2 Saund. 388 b,) remarks, it is to be recollected that the case of *Hinde v. Lyons*, 3 Leon. 64, 70, (determined in the 19th year of the reign of Elizabeth,) was the first case in which it was solemnly decided, that a limitation over, in a will, after a devise carrying the fee, was not necessarily void: as it had been previously held to be by the greatest lawyers of their age, in the case reported in Dyer, 33 a.

In the *Serjeant’s case*, (2 Rolle’s Rep. 425,) it is said, that the judges who first expounded the statute *de donis conditionalibus*, so that a remainder could be limited upon an estate tail, did not perceive the mischief that was found to ensue from that construction; but when they did

perceive it, they invented means to destroy the remainder. Now, if it had been customary, before the statute, to allow remainders to be limited on conditional fees, the consequences of that practice must also have been familiar; and it was strange that they should have been unperceived by the judges who first expounded the statute.

On the whole, though it must, in all cases, be dangerous to differ from Mr. Preston on a point of conveyancing, and more especially when he has undertaken the task, (which, of course, he must have felt a painful one, requiring more than ordinary circumspection,) to criticise the doctrine of such a lawyer as Lord Hardwicke; still, as he cites no authority for that correction, it may be safer to rely on the statement which he makes in the 1st vol. of his Treat. on Estates, (pp. 90, 91,) and for which he does cite numerous authorities. In the work just referred to, Mr. Preston teaches us, (as Blackstone will be found also to do, *post*, in chap. 11 of this volume, p. 165,) that a remainder is a residue or remnant of an estate in lands expectant on a particular estate; and it must commence in interest after a particular estate, *not after* the determination of *an estate in fee*, either *qualified, base, or determinable*. And Mr. Preston draws the eyes of his readers to this observation, by the use of Italics. So, in his edition of Watkins’s Princip. of Conv. (p. 76, 3rd edit.) Mr. Preston does not merely pass over without comment his author’s statement, that “the common law does not permit any remainder to be limited on a fee either absolute or base;” but amplifies it, and adds in the margin fresh references in its support. If, in his Essay on Abstracts, he made a slip, his reputation is too well established to be in the slightest

Neither can a copyhold estate be entailed by virtue of the *statute*; for that would tend to encroach upon and restrain the will of the lord: but, by the *special custom* of the manor, a copyhold may be limited to the heirs of the body (*t*) (34); for here the custom ascertains and interprets the lord's will.

Next, as to the several *species* of estates-tail, and how they are respectively created. Estates-tail are either *general* or *special*. Tail-general is where lands and tenements are given to one, and the *heirs of his body begotten*: which is called tail-general, because, how often soever such donee in tail be married, his issue in general by all and every such marriage is, in successive order, capable of inheriting the estate-tail, *per formam doni* (*u*). Tenant in tail-special is where the gift is restrained to certain heirs of the donee's body, and does not go to all of them in general. And this may *happen several ways (*w*). I shall instance in only one; as where lands and tenements are given to a man and the

Estates tail are either *general* or *special*:

General—where lands, &c. are given to one, and the heirs of his body begotten;

Special—where the grant is restrained to certain specified heirs of the grantee.

[* 114]

(*t*) 3 Rep. 8.

(*u*) Litt. s. 14, 15.

(*w*) Litt. s. 16, 26, 27, 28, 29.

degree injured by it: but they who cannot so well afford to be occasionally wrong, have some right to complain of his not giving any authority in his Essay on Abstracts, for his correction of the doctrines of Lords Hardwicke and Loughborough, which doctrines seem to derive ample support, not only from the cases cited in this note, but from several of Mr. Preston's own most valuable works.

The instance of an annuity, charging merely the person of the grantor, seems to be the only one in which a fee-conditional, of a personal chattel, can now be created. Neither leaseholds, nor any other descriptions of personal property (except such annuities as aforesaid) can be limited so as to make them transmissible in a course of succession to heirs: they must go to personal representatives. (*Countess of Lincoln v. Duke of Newcastle*, 12 Ves. 225; *Keiley v. Fowler*, Wilm. Notes, 310.) There is consistency, therefore, in holding, that the very

same words may be differently construed, and have very different operations, when applied, in the same instrument, to different descriptions of property, governed by different rules. (*Forth v. Chapman*, 1 P. Wms. 667; *Elton v. Eason*, 19 Ves. 77.) Thus, the same words which would only give an estate tail in freehold property, will carry the absolute interest in leasehold, or other personal property. (*Green v. Stevens*, 19 Ves. 73; *Crooke v. De Vandes*, 9 Ves. 203; *Tothill v. Pitt*, 1 Mad. 509.)

(33) See *post*, chap. 16, pp. 258—261, and the notes thereto.

(34) Copyholds are not within the statute of frauds and perjuries, (29 Car. II. c. 3,) but will pass by any testamentary writing, which is sufficient to bequeath personalty. (*Wagstaff v. Wagstaff*, 2 P. Wms. 258; *Attorney General v. Andrews*, 1 Ves. sen. 225; *Tuffnell v. Page*, 2 Atk. 37; *Doe v. Danvers*, 7 East, 322.)

heirs of his body, on Mary his now wife to be begotten: here no issue can inherit, but such special issue as is engendered between them two; not such as the husband may have by another wife: and therefore it is called special tail. And here we may observe, that the words of inheritance (to him and his *heirs*) give him an estate in fee: but they being *heirs to be by him begotten*, this makes it a fee-tail; and the person being also limited, on whom such heirs shall be begotten, (*viz. Mary his present wife*) this makes it a fee-tail special.

Estates tail may be either in tail male, or tail female.

Estates, in general and special tail, are farther diversified by the distinction of sexes in such entails; for both of them may either be in tail *male* or tail *female*. As if lands be given to a man, and his *heirs male of his body begotten*, this is an estate in tail male general; but if to a man and the heirs *female of his body on his present wife begotten*, this is an estate in tail female special. And, in case of an entail male, the heirs female shall never inherit, nor any derived from them; nor, *è converso*, the heirs male, in case of a gift in tail female (*x*). Thus, if the donee in tail male hath a daughter, who dies leaving a son, such grandson in this case cannot inherit the estate-tail; for he cannot deduce his descent wholly by heirs male (*y*). And as the heir male must convey his descent wholly by males, so must the heir female wholly by females. And therefore, if a man hath two estates-tail, the one in tail male, the other in tail female; and he hath issue a daughter, which daughter hath issue a son; this grandson can succeed to neither of the estates; for he cannot convey his descent wholly either in the male or female line (*z*).

Words necessary to create a fee-tail.

[* 115]

As the word *heirs* is necessary(35) to create a fee, so in farther limitation of the strictness of the feodal donation, the word *body*, or some other words of procreation, are necessary to make it a fee-tail, and ascertain to what heirs in particular *the fee is limited. If, therefore, either the words of inheritance or words of procreation be omitted, albeit the others are inserted in the grant, this will not make an estate-tail. As, if the grant be to a man and his *issue of*

(*x*) Litt. s. 21, 22.

(*y*) Ibid. s. 24.

(*z*) Co. Litt. 25.

(35) See *ante*, the note to p. 108.

his body, to a man and his *seed*, to a man and his *children*, or *offspring*; all these are only estates for life, there wanting the words of inheritance, his heirs (*a*). So, on the other hand, a gift to a man, and his *heirs male*, or *female*, is an estate in fee-simple, and not in fee-tail; for there are no words to ascertain the body out of which they shall issue (*b*). Indeed, in last wills and testaments, wherein greater indulgence is allowed, an estate-tail may be created by a devise to a man and his *seed*, or to a man and his *heirs male*; or by other irregular modes of expression (*c*) (36).

There is still another species of entailed estates, now indeed grown out of use, yet still capable of subsisting in law; which are estates *in libero maritagio*, or *frankmarriage*. These are defined (*d*) to be, where tenements are given by one man to another, together with a wife, who is the daughter or cousin of the donor, to hold in frankmarriage. Now, by such gift, though nothing but the word *frankmarriage* is expressed, the donees shall have the tenements to them, and the heirs of their two bodies begotten; that is, they are tenants in special tail. For this one word, *frankmarriage*, does *ex vi termini* not only create an inheritance, like the

Of estates in
libero maritagio,
or *frankmar-*
riage.

(*a*) Co. Litt. 20.

(*c*) Co. Litt. 9, 27.

(*b*) Litt. s. 31; Co. Litt. 27.

(*d*) Litt. s. 17.

(36) Whether a devise to a man and his *posterity*, would give an estate tail, or a fee, was considered a doubtful question in the *Attorney General v. Bamfield*. (2 Freem. 268.) The whole 5th section of Mr. Roberts' 4th chapter of his Treat. on Wills, is devoted to an enumeration of some of the many expressions by which an estate-tail may be created in a will. He commences by observing that, "to discuss the varieties into which the cases in the books have expanded the doctrine, would require volumes of learned labour." As Mr. Roberts thought, that the readers of a professed treatise on wills exclusively, "could only expect the general heads of so multifarious a subject to be treated of;" it would be still more out of place to enlarge upon it here. The

key to the construction of any particular will, is the intention of the testator, when that can be collected, and effect can be given to it consistently with the rules of law. And when the testator appears to have had a general intention, and also a secondary intention, if the two cannot stand together, the latter must give way to the former. (*Doe v. Smith*, 7 T. R. 533; *Doe v. Applin*, 4 T. R. 87; *Doe v. Cooper*, 1 East, 234; *Wight v. Leigh*, 15 Ves. 568; *Brownsword v. Edwards*, 2 Ves. sen. 248; *Southby v. Stonehouse*, 2 Ves. sen. 615.) And see some of the leading general rules, as to the construction of testamentary instruments, brought together in the 4th note to *Blake v. Bunbury*, 1 Hoven-den's Supplem. to Vesey, jun. Rep. p. 77.

word *frankalmoign*, but likewise limits that inheritance; supplying not only words of descent, but of procreation also. Such donees in frankmarriage are liable to no service but fealty; for a rent reserved thereon is void, until the fourth degree of consanguinity be past between the issues of the donor and donee (*e*).

Incidents to a tenancy in tail, under the statute of Westm. 2 (*de donis*).

[* 116]

The *incidents* to a tenancy in tail, under the statute Westm. 2, are chiefly these (*f*): 1. That a tenant in tail may commit *waste* on the estate-tail, by felling timber, pulling down houses, or the like, *without being impeached, or called to account for the same. 2. That the wife of the tenant in tail shall have her *dower*, or thirds, of the estate-tail. 3. That the husband of a female tenant in tail may be tenant by the *curtesy* of the estate-tail. 4. That an estate-tail may be *barred* or destroyed by a fine, by a common recovery, or by lineal warranty descending with assets to the heir. All which will hereafter be explained at large.

Consequences of the establishment of estates-tail.

Thus much for the nature of estates-tail: the establishment of which family law (as it is properly stiled by Pigott) (*g*), occasioned infinite difficulties and disputes (*h*). Children grew disobedient when they knew they could not be set aside: farmers were ousted of their leases made by tenants in tail; for, if such leases had been valid, then, under colour of long leases, the issue might have been virtually disinherited: creditors were defrauded of their debts; for, if tenant in tail could have charged his estate with their payment, he might also have defeated his issue, by mortgaging it for as much as it was worth: innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought; of suits in consequence of which our ancient books are full: and treasons were encouraged; as estates-tail were not liable to forfeiture, longer than for the tenant's life. So that they were justly branded, as the source of new contentions and mischiefs unknown to the common law; and almost universally considered as the common grievance of the realm (*i*). But as the nobility were always fond of this statute, because it preserved their family estates from forfeiture, there was little hope of procuring a repeal by the legislature, and therefore, by the contrivance

(*e*) Litt. s. 19, 20.

(*f*) Co. Litt. 224.

(*g*) Com. Recov. 5.

(*h*) 1 Rep. 131.

(*i*) Co. Litt. 19; Moor, 156; 10 Rep. 38.

of an active and politic prince, a method was devised to evade it.

About two hundred years intervened between the making of the statute *de donis*, and the application of common recoveries (37) to this intent, in the twelfth year of Edward IV.; which were then openly declared by the judges to be a *sufficient bar of an estate-tail (*k*). For though the courts had, so long before as the reign of Edward III. very frequently hinted their opinion that a bar might be effected upon these principles (*l*), yet it was never carried into execution, till Edward IV. observing (*m*) (in the disputes between the houses of York and Lancaster) how little effect attainders for treason had on families, whose estates were protected by the sanctuary of entails, gave his countenance to this proceeding, and suffered Taltarum's case to be brought before the court (*n*): wherein, in consequence of the principles then laid down, it was in effect determined, that a common recovery suffered by tenant in tail should be an effectual destruction thereof. What common recoveries are, both in their nature and consequences, and why they are allowed to be a bar to the estate-tail, must be reserved to a subsequent inquiry. At present I shall only say, that they are fictitious proceedings, introduced by a kind of *pia fraud*, to elude the statute *de donis*, which was found so intolerably mischievous, and which yet one branch of the legislature would not then consent to repeal; and that these recoveries, however clandestinely introduced, are now become by long use and acquiescence a most common assurance of lands; and are looked upon as the legal mode of conveyance, by which tenant in tail may dispose of his lands and tenements: so that no court will suffer them to be shaken or reflected on, and even acts of parliament (*o*) have by a side-wind countenanced and established them.

Estates-tail barred by common recoveries.

[* 117]

(*k*) 1 Rep. 131; 6 Rep. 40.

(*l*) 10 Rep. 37, 38.

(*m*) Pigott, 8.

(*n*) Year book, 12 Edw. IV. 14, 19;

Fitzh. Abr. tit. faux recov. 20; Bro.

Abr. Ibid. 30, tit. recov. in value, 19;

Tit. taile, 36.

(*o*) 11 Hen. VII. c. 20; 7 Hen.

(37) See *post*, the 4th sect. of the 21st chapter of this volume, p. 357—364, and the notes thereto.

Common recoveries have been abol-

ished by the statute of 3 & 4 Gul. IV. c. 74, and simpler forms of assurance substituted.

By the 26 H.
VIII. c. 13, es-
tates-tail are lia-
ble to forfeiture
for high treason.

[* 118]

This expedient having greatly abridged estates-tail with regard to their duration, others were soon invented to strip them of other privileges. The next that was attacked was their freedom from forfeitures (38) for treason. For, notwithstanding the large advances made by recoveries, in the compass of about threescore years, towards unfettering these inheritances, and thereby subjecting the lands to forfeiture, the rapacious prince then reigning, finding them frequently *resettled in a similar manner, to suit the convenience of families, had address enough to procure a statute (*p*) whereby all estates of inheritance (under which general words estates-tail were covertly included) are declared to be forfeited to the king upon any conviction of high treason.

By the 32 H.
VIII. c. 28, cer-
tain leases by
tenants in tail
allowed;

and by the 32
H. VIII. c. 36, a
fine is declared
to be a bar to an
estate-tail:

The next attack which they suffered in order of time, was by the statute 32 Hen. VIII. c. 28 (39), whereby certain leases made by tenants in tail, which do not tend to the prejudice of the issue, were allowed to be good in law, and to bind the issue in tail. But they received a more violent blow, in the same session of Parliament, by the construction put upon the statute of fines (*q*), by the statute 32 Hen. VIII. c. 36, which declares a fine duly levied by tenant in tail to be a complete bar to him and his heirs, and all other persons claiming under such entail. This was evidently agreeable to the intention of Henry VII., whose policy it was (before common recoveries had obtained their full strength and authority) to lay the road as open as possible to the alienation of landed property, in order to weaken the overgrown power of his nobles. But as they, from the opposite reasons, were not easily brought to consent to such a provision, it was therefore couched, in his act, under covert and obscure expressions. And the judges, though willing to construe that statute as favourably as possible for the defeating of entailed estates, yet hesitated at giving fines so extensive a power by mere implication, when the statute *de donis* had expressly declared, that they should *not* be a bar

VIII. c. 4; 34 & 35 Hen. VIII. c. 20;
14 Eliz. c. 8; 4 & 5 Ann. c. 16; 14
Geo. II. c. 20.

(*p*) 26 Hen. VIII. c. 13.
(*q*) 4 Hen. VII. c. 24.

(38) See *ante*, the note to Vol. I. volume.
p. 299, and the note to p. 72, of this

(39) See *post*, chap. 20, p. 319.

to estates-tail. But the statute of Henry VIII., when the doctrine of alienation was better received, and the will of the prince more implicitly obeyed than before, avowed and established that intention. Yet, in order to preserve the property of the crown from any danger of infringement, all estates-tail created by the crown, and of which the crown has the reversion, are excepted out of this statute. And the same was done with regard to common recoveries, by the statute 34 & 35 Hen. VIII. c. 20, which enacts, that no feigned recovery had against tenants in tail, where the estate was created by the *crown (*r*), and the remainder or reversion continues still in the crown, shall be of any (40) force and effect. Which is allowing, indirectly and collaterally, their full force and effect with respect to ordinary estates-tail, where the royal prerogative is not concerned.

estates-tail created by the crown, and of which the crown has the reversion, excepted.

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Lastly, by a statute of the succeeding year (*s*), all estates-tail are rendered liable to be charged for payment of debts due to the king by record or special contract; as since, by the bankrupt laws (*t*), they are also subjected to be sold for the debts contracted by a bankrupt. And, by the construction put on the statute 43 Eliz. c. 4, an appointment (*u*) by tenant in tail of the lands entailed, to a charitable use, is good without fine or recovery.

Other charges to which estates-tail are liable.

Estates-tail, being thus by degrees unfettered, are now reduced again to almost the same state, even before issue born, as conditional fees were in at common law, after the condition was performed, by the birth of issue. For, first,

(*r*) Co. Litt. 372.

(*t*) Stat. 21 Jac. I. c. 19.

(*s*) 33 Hen. VIII. c. 39, s. 75.

(*u*) 2 Vern. 453; Chan. Prec. 16.

(40) Before the statute of Henry VIII. the supposed recompense in value was held to bar *the issue in tail* of the donee in tail of the crown; the recoveror had a fee-simple determinable upon the estate tail, and the king had his ancient fee-simple also:—this being the single anomalous case in which the rule, that two several fees in the same estate cannot be co-existent, was departed from. (*Walsingham's case*, Plowd. 555 a, 558 a.) Since the statute, an estate tail of the gift

of the crown is privileged (as our author states in the text,) so long as the reversion remains in the crown; but, Mr. Preston observes (in his edition of *Watk. Princip. of Convey.* p. 111,) “if the reversion be granted to a subject, the entail and the reversion may be barred by means of a common recovery duly suffered:” this may now be done by the simpler form of assurance substituted by the act of 3 & 4 Gul. IV. c. 74.

the tenant in tail is now enabled to aliene his lands and tenements, by fine, by recovery, or by certain other means; and thereby to defeat the interest as well of his own issue, though unborn, as also of the reversioner, except in the case of the crown: secondly, he is now liable to forfeit them for high treason: and, lastly, he may charge them with reasonable leases, and also with such of his debts as are due to the crown on specialties, or have been contracted with his fellow-subjects in a course of extensive commerce.

CHAPTER VIII.

OF FREEHOLDS, NOT OF INHERITANCE.

WE are next to discourse of such estates of freehold, as are not of inheritance, but *for life* only. And of these estates for life, some are *conventional*, or expressly created by the act of the parties; others merely *legal*, or created by construction and operation of law (*a*). We will consider them both in their order.

Of the nature and properties of estates of freehold *for life* only.

I. Estates for life, expressly created by deed or grant, (which alone are properly conventional,) are where a lease is made of lands or tenements to a man, to hold for the term of his own life, or for that of any other person, or for more lives than one: in any of which cases he is stiled tenant for life; only when he holds the estate by the life of another, he is usually called tenant *pur auter vie* (*b*) (1). These estates for life are, like inheritances, of a feodal nature; and were, for some time, the highest estate that any man could have in a feud, which, as we have before seen (*c*), was not in its original hereditary. They are given or conferred by the same feodal rights and solemnities, the same investiture or livery of seisin, as fees themselves are; and they are held by fealty, if demanded, and such conventional rents and services as the lord or lessor, and his tenant or lessee, have agreed on.

I. Of estates for life, created by deed or grant.

*Estates for life may be created, not only by the express words before mentioned, but also by a general grant, without defining or limiting any specific estate (2). As, if one

[* 121]
A general grant, without limiting any specific estate, creates a tenancy for life.

(*a*) Wright, 190.

(*b*) Litt. s. 56.

(*c*) Page 55.

(1) See *post*, chapter 16 of this volume, pp. 258, *et seq.* and the notes thereto.

(2) This passage was cited, and re-

grants to A. B. the manor of Dale, this makes him tenant for life (*d*). For though, as there are no words of inheritance or *heirs*, mentioned in the grant, it cannot be construed to be a fee (3), it shall however be construed to be as large an estate as the words of the donation will bear, and therefore an estate for life. Also such a grant at large, or a grant for term of life generally, shall be construed to be an estate for the life of *the grantee* (*e*); in case the grantor hath authority to make such grant: for an estate for a man's own life is more beneficial and of a higher nature than for any other life; and the rule of law is, that all grants are to be taken most strongly against the grantor (*f*), unless in the case of the king (4).

Of estates for life, determinable upon contingencies.

Such estates for life will, generally speaking, endure as long as the life for which they are granted: but there are some estates for life, which may determine upon future contingencies, before the life for which they are created expires. As, if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in these, and similar cases, whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone (*g*). Yet, while they subsist, they are reckoned estates for life; because, the time for which they will endure being uncertain, they may by possibility last for life, if the contingencies upon which they are to determine do not sooner happen. And, moreover, in case an estate be granted to a man for his life, generally, it may also determine by his *civil* death: as if he enters into a monastery, whereby he is dead in law (*h*): for which reason in conveyances the grant is usually made "for the term of a man's *natural* life;" which can only determine by his *natural* death (*i*).

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Of the incidents to an estate for life.

*The *incidents* to an estate for life are principally the following; which are applicable not only to that species of

(*d*) Co. Litt. 42.

(*e*) Ibid.

(*f*) Ibid. 36.

(*g*) Co. Litt. 42; 3 Rep. 20.

(*h*) 2 Rep. 48.

(*i*) See Vol. I. p. 132.

lied upon, by the Court of K. B. in *Hewlins v. Shippam*, (5 Barn. & Cres. 229; S. C. 7 Dowl. & Ryl. 796.)

(3) See *ante*, p. 108, and 111.

(4) See *ante*, the note to p. 22.

tenants for life, which are expressly created by deed; but also to those, which are created by act and operation of law.

1. Every tenant for life, unless restrained by covenant or agreement, may of common right take upon the land demised to him *reasonable estovers* (*k*) or *botes* (*l*) (5). For he hath a right to the full enjoyment and use of the land, and all its profits, during his estate therein. But he is not permitted to cut down timber or do other waste upon the premises (*m*): for the destruction of such things, as are not the temporary profits of the tenement, is not necessary for the tenant's complete enjoyment of his estate (6); but tends to the permanent and lasting loss of the person entitled to the inheritance.

1. A tenant for life may take reasonable *estovers*.

2. Tenant for life, or his representatives, shall not be prejudiced by any sudden determination of his estate, because such a determination is contingent and uncertain (*n*). Therefore, if a tenant for his own life sows the lands, and dies before harvest, his executors shall have the *emblems*, or profits of the crop: for the estate was determined by the *act of God*, and it is a maxim in the law, that *actus Dei nemini facit injuriam*. The representatives, therefore, of the tenant for life shall have the emblems to compensate for the labour and expense of tilling, manuring, and sowing the lands (7); and also for the encouragement of husbandry,

2. Emblems.

(*k*) See p. 35.

(*l*) Co. Litt. 41.

(*m*) Ibid. 53.

(*n*) Ibid. 55.

(5) See *ante*, p. 34, and the note thereto.

(6) See *post*, chapter 18, p. 283, and the note thereto, for a fuller discussion of this matter. And see our author's own qualification of this doctrine, in cases of tenancy after possibility of issue extinct, if such tenants are to be considered, as is doubtfully stated in p. 125, only tenants for life, with many of the privileges of a tenant in tail. See also *post*, the note to p. 125.

(7) In the case of *Latham v. Atwood*, (Cro. Car. 515,) it was decided, that hops, growing out of ancient

roots, are *like* emblems, and shall go to the personal representatives of a tenant for life; for manurance and industry are necessary to the growth of hops, which are, therefore, not to be compared to such articles as grow of themselves. But, in *Grantham v. Hawley*, (Hob. 132,) it was said to be settled, that, if A., seised of land, sow it with corn, and then convey it to B. for life, remainder to C. for life; and then B. die before the corn is reaped, C. shall have it, and not the executors of B., for the reason of charge and industry in B. fails; (and see, to the same effect, *Anonym.* Cro. Eliz. 61;

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which being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege that the law can give it. Wherefore, by the feodal law, if a tenant for life died between the beginning of September and the end of February, the lord, who was entitled to the reversion, was also entitled to the profits of the whole year: but if he died between the beginning of March and the end *of August, the heirs of the tenant received the whole (o). From hence our law of emblements seems to have been derived, but with very considerable improvements. So it is also, if a man be tenant for the life of another, and *cestuy que vie*, or he on whose life the land is held, dies after the corn sown, the tenant *pur auter vie* shall have the emblements. The same is also the rule, if a life-estate be determined by the *act of law*. Therefore, if a lease be made to husband and wife during coverture, (which gives them a determinable estate for life,) and the husband sows the land, and afterwards they are divorced *a vinculo matrimonii*, the husband shall have the emblements in this case; for the sentence of divorce is the act of law (p). But if an estate for life be determined by the tenant's *own act*, (as, by forfeiture for waste committed; or, if a tenant during widowhood thinks proper to marry,) in these, and similar cases, the tenants, having thus determined the estate by their own acts, shall not be entitled to take the emblements (q). The doctrine of emblements extends not only to corn sown, but to roots planted, or other annual artificial

(o) Feud. l. 2, t. 28.

(p) 5 Rep. 116.

(q) Co. Litt. 55.

Knevit v. Pool, Cro. Eliz. 463.) So, growing corn is a chattel, for which an executor may bring trespass; but grass growing is part of the freehold, to which the executor has no right. (*Emerson v. Emerson*, 1 Ventr. 187; 3 Salk. 160; and see *Lawton v. Lawton*, 3 Atk. 16.) Mr. Hargrave has observed (in note (2) to Co. Litt. 55 b,) "it is not easy to account for the distinction which gives corn growing to the *devisee*, but denies it to the *heir*: though this has been attempted in Gilbert's Law of Evid. p. 250." And

see p. 404, *post*. The principle upon which the law that gives emblements, was originally established, was fully discussed in *Graves v. Weld*, (5 Barn. & Adol. 117, S. C. 2 Nev. & Man. 732.) where it was held, that the doctrine applies to those species of crops only which ordinarily repay the labour by which they are produced, within the year in which that labour is bestowed: and the authorities upon which this law depends were stated to be *Littleton*, sect. 68, and *Coke's* commentary on that passage.

profit, but it is otherwise of fruit-trees, grass, and the like; which are not planted annually at the expense and labour of the tenant, but are either a permanent, or natural profit of the earth (*r*). For when a man plants a tree, he cannot be presumed to plant it in contemplation of any present profit; but merely with a prospect of its being useful to himself in future, and to future successions of tenants. The advantages also of emblements are particularly extended to the parochial clergy by the statute 28 Hen. VIII. c. 11 (8). For all persons, who are presented to any ecclesiastical benefice, or to any civil office, are considered as tenants for their own lives, unless the contrary be expressed in the form of donation.

3. A third incident to estates for life relates to the under-tenants, or lessees. For they have the same, nay greater indulgences than the lessors, the original tenants for life. The same; for the law of estovers and emblements with regard to the tenant for life, *is also law with regard to his under-tenant, who represents him and stands in his place (*s*): and greater; for in those cases where tenant for life shall not have the emblements, because the estate determines by his own act, the exception shall not reach his lessee, who is a third person. As in the case of a woman who holds *durante viduitate*; her taking husband is her own act, and therefore deprives her of the emblements: but if she leases her estate to an under-tenant, who sows the land, and she then marries, this her act shall not deprive the tenant of his emblements, who is a stranger, and could not prevent her (*t*). The lessees of tenants for life had also at the common law another most unreasonable advantage; for, at the death of their lessors, the tenants for life, these under-tenants might, if they pleased, quit the premises, and pay no rent to any body for the occupation of the land since the last quarter day, or other day assigned for payment of rent (*u*). To re-

3. As to their under-tenants or lessees.

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(*r*) Co. Litt. 55, 56; 1 Roll. Abr. 728.

(*s*) Co. Litt. 55.

(*t*) Cro. Eliz. 461; 1 Roll. Abr. 727.

(*u*) 10 Rep. 127.

(8) The 6th section of that statute enacts, that any incumbent, who before his death hath caused any of his glebe lands to be manured and

sown at his proper costs with any corn or grain, may declare his testament of all the profits of such corn.

medy which it is now enacted (*v*), that the executors or administrators of tenant for life, on whose death any lease determined, shall recover of the lessee a rateable proportion of rent, from the last day of payment to the death of such lessor (9).

II. Of tenancy
in tail, after
possibility of
issue extinct;

II. The next estate for life is of the legal kind, as contradistinguished from conventional; *viz.* that of tenant *in tail after possibility of issue extinct* (10). This happens where one is tenant in special tail, and a person, from whose body the issue was to spring, dies without issue; or, having left issue, that issue becomes extinct: in either of these cases the surviving tenant in special tail becomes tenant in tail after possibility of issue extinct. As where one has

(*v*) Stat. 11 Geo. II. c. 19, s. 15.

(9) In the case of *Paget v. Gee*, (reported in Ambl. 199, and of which a corrected note has since been published in 3 Swanst. 696,) Lord Hardwicke inclined to think that tenant in tail after possibility of issue extinct was within the intent of the statute of 11 Geo. II. though not within the letter thereof. But his lordship gave no opinion whether tenants *pur autre vie* could have relief by an equitable construction of the act; which, in terms, does not seem to extend to tenants *pur autre vie*; and therefore, it was thought, if *cestui que vie* died before payment of rent reserved by the tenant *pur autre vie*, the under-tenant might avoid payment of the rent from the last day of payment before the death of *cestui que vie*. (*William Clun's case*, 10 Rep. 128; *S. C. Cro. Jac.* 310; *Lord Rockingham v. Penrice*, 1 P. Wms. 180; *Jenner v. Morgan*, 1 P. Wms. 392.) But this injustice has been remedied by the statute of 4 & 5 Gul. IV. c. 22. As the interest accruing on a mortgage, or a bond, is held to be, in fact, due from day to day, the distribution, which is always made of such interest *pro rata* between the representatives of a deceased tenant for life and those in remainder, can hardly be called an

apportionment: but the dividends on the public funds being made payable on certain days, it has been held are not to be apportioned. (*Sherrard v. Sherrard*, 3 Atk. 503; *Banner v. Lowe*, 13 Ves. 135.) And though the statute just cited enacts that all dividends coming due at fixed periods shall be apportioned, it does not appear that dividends on stock in the public funds are meant to be included, but only dividends of profits.

(10) This estate, though it partakes, as to some of its qualities, of the nature of an estate tail, is correctly classed by our author under the head of life estates. (*Lewis Bowles's case*, 11 Rep. 80.) There are four *qualities* annexed to the estate of tenant in tail after possibility of issue extinct, which prove it to be in fact only an estate for life. 1. If this tenant makes a feoffment in fee, it is a forfeiture; because, having no longer a descendible estate in him, he cannot transfer it to another, without prejudice to the person in remainder. 2. If an estate tail or in fee descends upon him, the estate tail after possibility of issue extinct is merged. 3. If he is impleaded, and makes default, the person in reversion shall be received; as upon default of any other tenant for life. 4. An exchange be-

an estate to him and his heirs on the body of his present wife to be begotten, and the wife dies without issue (*w*): in this case the man has an estate-tail, which cannot possibly descend to any one; and therefore the law makes use of this long periphrasis, as absolutely necessary to give an adequate idea of his estate. For if it had called him barely *tenant in fee-tail special*, that *would not have distinguished [* 125] him from others; and besides, he has no longer an estate of inheritance, or fee (*x*), for he can have no heirs capable of taking *per formam doni*. Had it called him *tenant in tail without issue*, this had only related to the present fact, and would not have excluded the possibility of future issue. Had he been styled *tenant in tail without possibility of issue*, this would exclude time past as well as present, and he might under this description never have had any possibility of issue. No definition, therefore, could so exactly mark him out, as this of *tenant in tail after possibility of issue extinct*, which (with a precision peculiar to our own law) not only takes in the possibility of issue in tail, which he once had, but also states that this possibility is now extinguished and gone.

This estate must be created by the act of God, that is, by the death of that person out of whose body the issue was to spring; for no limitation, conveyance, or other human act can make it. For, if land be given to a man and his wife, and the heirs of their two bodies begotten, and they are divorced *a vinculo matrimonii*, they shall neither of them have this estate, but be barely tenants for life, notwithstanding the inheritance once vested in them (*y*). A possibility of issue is always supposed to exist in law, unless extinguished by the death of the parties: even though the donees be each of them an hundred years old (*z*). which can only be created by the act of God.

This estate is of an amphibious nature, partaking partly of an estate-tail, and partly of an estate for life. The tenant is, in truth, only tenant for life, but with many of the privileges of a tenant in tail; as not to be punishable for waste, The nature of this estate.

(*w*) Litt. s. 32.

(*y*) Co. Litt. 28.

(*x*) 1 Roll. Rep. 184; 11 Rep. 80.

(*z*) Litt. s. 34; Co. Litt. 28.

tween this tenant and a bare tenant for life, is good: for, with respect to their duration, they are equal. (1 Instit. 28 a.) As to *quantity* of estate, it is

obvious, a tenant in tail after possibility of issue extinct has but an estate for life. (*Lewis Bowles's case*, 11 Rep. 80 b.)

&c. (a) (11): or, he is tenant in tail, with many of the restrictions of a tenant for life; as, to forfeit his estate, if he

(a) Co. Litt. 27.

(11) See *post*, chapter 18 of this volume, p. 283. All authorities agree, that tenant in tail after possibility of issue extinct is punishable for waste; (Doctor and Student, Dial. 2, c. 1:) but, in *Herlakenden's case*, (4 Rep. 63,) C. J. Wray is reported to have said, that, although tenant in tail after possibility, &c. cannot be punished in waste for cutting down trees upon the land he holds as such tenant; yet he cannot have the absolute interest in the trees, and, if he sells them, cannot retain the price. This *dictum* is noticed by Mr. Hargrave in his 2d note to Co. Litt. 27 b; and is countenanced by another *dictum* in *Abraham v. Bubb*, (2 Freeman, 53;) Mr. Christian, too, in his annotation upon the passage of the text, considers it as settled law, that, if a tenant in tail after possibility &c., cuts down trees, they do not become his property, but will belong to the party who has the first estate of inheritance. In opposition however to the doctrine imputed to C. J. Wray, and the *obiter dictum* in *Abraham v. Bubb*, it was distinctly resolved by the whole Court of King's Bench, (consisting of Coke, Crooke, Doddridge, and Haughton,) in the case of *Bowles v. Bertee*, (1 Rolle's Rep. 184; S. C. 11 Rep. 84,) that a tenant after possibility has the whole property in trees which he either causes to be cut down, or which are blown down, on the estate. And this seems to be now firmly settled by the case of *Williams v. Williams*: when that case was before Lord Chancellor Eldon, his lordship (as reported in 15 Ves. 427) intimated, that he could not imagine how it was doubted that the tenant, being punishable, had not, as a consequence, the property in the trees. That it was singular there should be an argument raised, that such a tenant

should be restrained from committing *malicious waste*, by cutting ornamental timber, (*Garth v. Cotton*, 1 Dick. 209,) if it was understood to be the law that he could not commit waste of *any* kind. (*Attorney General v. Duke of Marlborough*, 3 Mad. 539.) However, as all the previous cases in which tenant in tail after possibility of issue extinct had been determined to be punishable of waste, were cases in which the tenant had once been tenant in tail *with* the other donee in possession; and in the case of *Williams v. Williams* the tenant claimed in *remainder*, after the death of the joint donee; Lord Eldon thought it advisable, before he made a final decree, to direct a case to the Court of King's Bench, not describing the claimant as tenant in tail after possibility of issue extinct, but stating the limitations of the settlement under which the claim was made. The case was accordingly argued at law, and a certificate returned, that the claimant was tenant in tail after possibility of issue extinct; was unimpeachable of waste upon the estate comprised in the settlement; and, having cut timber thereon, was entitled to the timber so cut as her own property. (12 East, 221.)

A tenant for life, without impeachment of waste, and a tenant in tail after possibility of issue extinct, seem to stand upon precisely the same footing in regard to all questions of waste: (*Attorney General v. Duke of Marlborough*, 3 Mad. 539:) and a tenant for life, punishable for waste, is clearly not compellable to pursue such a course of management of the timber upon the estate, as a tenant in fee might think most advantageous. Whatever trees are fit for the purpose of timber he may cut down, though they may be still in an improving state.

aliens it in fee-simple (*b*): whereas such alienation by tenant in tail, though voidable by the issue, is no forfeiture of the estate to the reversioner: who is not concerned in interest, *till all possibility of issue be extinct. But, in general, the law looks upon this estate as equivalent to an estate for life only; and, as such, will permit this tenant to exchange his estate with a tenant for life; which exchange can only be made, as we shall see hereafter (12), of estates that are equal in their nature.

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III. Tenant *by the curtesy* (13) of *England*, is where a man marries a woman seised of an estate of inheritance, that is, of lands and tenements in fee-simple or fee-tail; and has by her issue, born alive, which was capable of inheriting her estate. In this case, he shall, on the death of his wife, hold the lands for his life, as tenant by the curtesy of England (*c*).

III. Tenancy
by the curtesy.(*b*) Co. Litt. 28.(*c*) Litt. s. 35, 52.

(*Smythe v. Smythe*, 2 Swanst. 252; *Brydges v. Stevens*, 2 Swanst. 152, n.; *Coffin v. Coffin*, Jacob's Rep. 72.) No tenant for life, however, of any description, although not subject to impeachment for waste, must cut down trees planted for ornament or shelter to a mansion-house, or saplings not fit to be felled as timber, for this would not be a fairly beneficial exercise of the license given to him, but a malicious and fraudulent injury to the remainder-man. (*Chamberlayne v. Dummer*, 3 Br. 549; *Cholmeley v. Paxton*, 3 Bing. 212; 10 Moo. 253; *Lord Tamworth v. Lord Ferrers*, 6 Ves. 420.) In this respect, the claim which might, perhaps, be successfully asserted in a court of law, as to the right of felling any timber whatsoever, is controuled in courts of equity: (*Marquis of Downshire v. Lady Sandys*, 6 Ves. 114; *Lord Bernard's case*, Prec. in Cha. 455:) and that even on the application of a mere tenant for life in remainder. (*Davies v. Leo*, 6 Ves. 787.) And not only wanton malice, but fraud and collusion, by which the legal remedies against waste may be evaded, will give to courts of equity a jurisdiction over such cases, often beyond,

and even contrary to, the rules of law. (*Garth v. Cotton*, 3 Atk. 755.)

A tenant for life, without impeachment of waste, has no interest in the timber on the estate whilst it is standing; nor can he convey any interest in such growing timber to another: (*Cholmeley v. Paxton*, 3 Bing. 211, 10 Moo. 252:) if, in execution of a power, he should sell the estate, with the timber growing thereon, he cannot retain for his own absolute use, that part of the purchase money which was the consideration for the timber; though, before he sold the estate, he might, it seems, have cut down every sizeable tree, and put the produce into his pocket. (*Doran v. Wiltshire*, 3 Swanst. 701.) And the peculiar privileges which a tenant for life after possibility of issue extinct is allowed to enjoy, because the inheritance was once in him, are personal privileges; if he grants over his estate to another, his grantee will be bare tenant for life. (2 Inst. 302; *George Ap Rice's case*, 3 Leon. 241.)

(12) See *post*, chapter 20 of this volume, p. 323.

(13) See Vol. I. p. 445, n.

The origin and nature of this estate.

This estate, according to Littleton, has its denomination, because it is used within the realm of England only; and it is said in the *Mirroure* (*d*) to have been introduced by King Henry the first; but it appears also to have been the established law of Scotland, wherein it was called *curialitas* (*e*), so that probably our word *curtesy* was understood to signify rather an attendance upon the lord's *court* or *curtis*, (that is, being his vassal or tenant,) than to denote any peculiar favour belonging to this island (14). And therefore it is laid down (*f*) that, by having issue, the husband shall be entitled to do homage to the lord, for the wife's lands alone: whereas, before issue had, they must both have done it together. It is likewise used in Ireland, by virtue of an ordinance of king Henry III. (*g*). It also appears (*h*) to have obtained in Normandy; and was likewise used among the ancient Almaines or Germans (*i*). And yet it is not generally apprehended to have been a consequence of feodal tenure (*k*), though I think some substantial feodal reasons may be given for its introduction. For, if a woman seised of lands hath issue by her husband, and dies, the husband is the natural guardian of the child, and as such is in reason entitled to the profits of the lands in order to maintain it (15); for which

(*d*) c. 1, s. 3.

(*e*) Crag. l. 2, c. 19, s. 4.

(*f*) Litt. s. 90; Co. Litt. 30, 67.

(*g*) Pat. 11 H. III. m. 30, in 2 Bac.

Abr. 659.

(*h*) Grand Coustum. c. 119.

(*i*) Lindenbrog. LL. Alman. t. 92.

(*k*) Wright, 294.

(14) Mr. Wooddeson, however, (in his 19 Vin. Lect. p. 18,) says, he cannot divest himself of the idea, that tenancy *by the curtesy of England*, is so called as betokening a local privilege or favour, rather than attendance on the lord's court. And he cites Selden, Spelman, and the Mirror, in support of his opinion: to which opinion Mr. Christian inclines in his note upon the passage in the text, observing, as Mr. Wooddeson had previously done, that a tenant by the curtesy is styled in Latin *tenens per legem Angliæ*. It may be added, that, in the original French of the statute of 13 Richard II. st. 1, c. 17,

tenants by the curtesy are called *tenantz par la ley d'Engleterre*.

Littleton, however, is not quite accurate, when (in his 35th section) he says, tenancy by curtesy is used in no other realm but in England only. If it be admitted that the Scotch and Irish, who recognize this tenancy, adopted it from us, still, Wright (in his Law of Ten. 106,) and Mr. Wooddeson himself, both cite authorities, which show, that not only the principles but the minutiae of the doctrine were most extensively spread by the Roman code, as consonant to nature and reason.

(15) "And this estate seems

reason the heir apparent of a tenant by the curtesy could not be in ward to the lord of the fee, during the life of such tenant (*l*). As soon, therefore, as any child was born, the father began to have a permanent interest in the lands, he became one of the *pares curtis*, did homage to the lord, and was called tenant by the curtesy *initiate*; and this estate being once vested in him by the birth of the child, was not suffered to determine by the subsequent death or coming of age of the infant.

There are four requisites necessary to make a tenancy by the curtesy; marriage, seisin of the wife, issue, and death of the wife (*m*). 1. The marriage must be canonical and legal. 2. The seisin of the wife must be an actual seisin, or possession of the lands; not a bare right to possess, which is a seisin in law (*l*6), but an actual possession, which is a seisin in deed. And therefore a man shall not be tenant by the curtesy of a remainder or reversion (*l*7). But of some incorporeal hereditaments a man may be tenant

Its four requisites—

1. Marriage—
which must be
legal; 2. Seisin
of the wife—
which must be
an actual seisin;

(*l*) F. N. B. 143.

(*m*) Co. Litt. 30.

founded upon the natural and rational principle, that it is fitter that the son should be in a state of dependence upon the father, than the father upon the son.”—CH.

[It should be observed, however, that Sir Joseph Jekyll, M. R., said, (in *Banks v. Sutton*, 2 P. Wms. 703,) that “tenancy by curtesy hath no moral foundation, (and see Doctor & Student, Dial. 2, c. 15,) and is therefore properly styled a tenancy by the curtesy of England, that is, an estate by *favour* of the law of England.” Nathaniel Bacon, (in his Disc. on the L. of Eng. 65,) calls tenure by the curtesy, “a law of counter-tenure to dower.”—ED.]

(*l*6) Upon a seisin in law by her husband, a woman shall have her dower; (Perk. 371; Co. Litt. 31;) but a man can never be tenant by the curtesy, unless his wife, or he, in her right, has obtained seisin in deed or actual possession of the lands in the life of his wife. (Doctor and Student,

Dial. 2, ch. 15; *Finch's Law*, 129; Perk. sect. 458.) The reason assigned by Lord Coke for this distinction is, that it is not in the power of a wife to enforce her husband's actual seisin of lands; (and see Perk. sect. 366;) but it is the husband's own neglect, if he omits making an actual entry upon his wife's lands. For the exclusion of the husband's claim, our author adds another reason (in p. 128,) founded upon a standing rule of law.

(*l*7) A man will not be entitled to tenancy by the curtesy of, nor a woman to dower out of, a reversion or remainder *expectant upon an estate of freehold*; but upon a reversion expectant upon an estate for years, both these rights (of dower and of curtesy) accrue; (*Stoughton v. Leigh*, 1 Taunt. 410;) for the possession of the tenant for years constitutes a legal seisin of the freehold in reversion. (*De Gray v. Richardson*, 3 Atk. 470; *Goodtitle v. Newman*, 3 Wils. 521.)

3. Issue born
alive.

[* 128]

by the curtesy, though there have been no actual seisin of the wife; as in case of an advowson, where the church has not become void in the lifetime of the wife: which a man may hold by the curtesy, because it is impossible ever to have actual seisin of it, and *impotentia excusat legem* (n) (18). If the wife be an idiot, the husband shall not be tenant by the curtesy of her lands; for the king by prerogative is entitled to them, the instant she herself has any title (19): and since she could never be rightfully seised of the lands, and the husband's title depends entirely upon her seisin, the husband can have no title as tenant by the curtesy (o) (20). 3. The issue must be born alive. Some have had a notion that it must be heard to cry; but that is a mistake. Crying indeed is the *strongest* evidence of its being born alive; but it is not the *only* evidence (p). The issue also must be born during the life of the mother; for if the mother dies in labour, and the Cæsarean operation is performed, the husband in this case shall not be tenant by the *curtesy: because, at the instant

(n) Co. Litt. 29.

(o) Co. Litt. 30; Plowd. 263.

(p) Dyer, 25; 1 Rep. 34.

(18) A man may be tenant by the curtesy of a rent, though his wife die before the day of payment. (*Shelley's case*, 1 Rep. 97 b; Keilw. 104 b, pl. 13; Perk. sect. 469.)

(19) This is a questionable reason for a very sound position: for *some* purposes, no doubt, (for instance, as to avoiding all *mesne* acts done by an idiot,) the office, when found, has relation to the time when the idiot's estate commenced: but, the king is entitled to the profits of an idiot's estate, only from the time when he is charged with the responsibility of finding the idiot and his family necessities, and that, of course, is not till after office found. (*Tourson's case*, 8 Rep. 339.) And in the margin of the report of *Hales v. Petit*, (1 Plowd. 264,) it is observed, that the king's title to the custody of the inheritance cannot continue longer than the life of the idiot; and therefore the king's

claim does not seem to afford any colour of reason why the husband should not be tenant by the curtesy, seeing that his title, though initiate by the seisin of his wife, is not consummate, nor begins to take effect, until her death, at which time the king's title is at an end.

The true principles of sound sense and reason, why neither the husband of an idiot ought to be allowed his tenancy by curtesy, nor the wife of an idiot her dower, is stated by our author in a subsequent passage of this chapter, (p. 130,) where he observes, that an idiot cannot marry, being incapable of consenting to any contract. By the act of 15 Geo. II. c. 30, the marriage of a *non compos* is declared to be altogether null and void. It seems requisite, however, to obtain a sentence from the Ecclesiastical Court. (*Ex parte Turing*, 1 Ves. & Bea. 141.)

(20) See the last preceding note.

of the mother's death, he was clearly not entitled, as having had no issue born, but the land descended to the child, while he was yet in his mother's womb; and the estate being once so vested, shall not afterwards be taken from him (*q*) (21). In gavelkind lands, a husband may be tenant by the curtesy without having any issue (*r*) (22). But in general there must be issue born: and such issue as is also capable of inheriting the mother's estate (*s*). Therefore, if a woman be tenant in tail *male*, and hath only a *daughter* born, the husband is not thereby entitled to be tenant by the curtesy; because such issue female can never inherit the estate in tail male (*t*). And this seems to be the principal reason why the husband cannot be tenant by the curtesy of any lands of which the wife was not actually seised: because, in order to entitle himself to such estate, he must have begotten issue that may be heir to the wife: but no one, by the standing rule of law, can be heir to the ancestor, of any land whereof the ancestor was not actually seised (23); and therefore, as the husband hath never begotten any issue that can be heir to those lands (24), he shall not be tenant of them by the curtesy (*u*). And hence we may observe, with how much nicety and consideration the old rules of law were framed; and how closely they are connected and interwoven together, supporting, illustrating, and demonstrating one another. The time when the issue

(*q*) Co. Litt. 29.

(*r*) Ibid. 30.

(*s*) Litt. s. 56.

(*t*) Co. Litt. 29.

(*u*) Co. Litt. 40.

(21) The same doctrines are laid down in *Paine's case*. (8 Rep. 69.)

(22) Robinson (in his Treat. on Gavelk. book 2, c. 1,) informs us, that by the special custom of gavelkind, a husband who survives his wife is entitled to a *moiety* of her lands, (but no more,) whether he has issue or not; but this interest, in conformity with the custom of Normandy, is forfeited by a second marriage: it was formerly called the *Man's freebench*. See *ante*, the note to p. 83, *ad finem*.

(23) If the second section of the statute of 3 & 4 Gul. IV. c. 106, is to be construed literally; that which in

the text is termed "a standing rule of law" is overthrown. The act cited says, "in every case of descent, the person last *entitled* to the land shall be considered to have been the purchaser, unless it be proved that he inherited the same."

(24) This is not stated with our author's usual precision. The issue, in the case put, might be heir to the *lands*, though he could not take as heir to his mother, but as heir to his ancestor, who was last actually seised. (See *post*, chapter 14 of this volume, pp. 209, 227; see also 1 Inst. 11 b.)

4. Death of the wife.

IV. Tenancy in dower.

[* 129]

Of the origin of dower.

was born is immaterial, provided it were during the coverture; for, whether it were born before or after the wife's seisin of the lands, whether it be living or dead at the time of the seisin, or at the time of the wife's decease, the husband shall be tenant by the curtesy (*w*). The husband, by the birth of the child, becomes (as was before observed) tenant by the curtesy *initiate* (*x*), and may do many acts to charge the lands, but his estate is not *consummate* till the death of the wife: which is the fourth and last requisite to make a complete tenant by the curtesy (*y*).

*IV. Tenant in *dower* is where the husband of a woman is seised (25) of an estate of inheritance, and dies; in this case, the wife shall have the third part of all the lands and tenements whereof he was seised at any time during the coverture, to hold to herself for the term of her natural life (*z*).

Dower is called in Latin by the foreign jurists *doarium*, but by Bracton and our English writers *dos*: which among the Romans signified the marriage portion, which the wife brought to her husband; but with us is applied to signify this kind of estate, to which the civil law, in its original state, had nothing that bore a resemblance (26); nor indeed is there any thing in general more different, than the regulation of landed property according to the English

(*w*) Co. Litt. 29.

(*x*) Ibid. 30.

(*y*) Ibid.

(*z*) Litt. s. 36.

(25) The statute of 3 & 4 Gul. IV. c. 105, enacts that widows shall be entitled to dower out of equitable estates, and that seisin in the husband shall not be necessary to give the widow title to dower: but, on the other hand, it is enacted, that no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will: and all charges, debts and contracts to which his lands are liable, shall be effectual as against his widow's right to dower. It is also enacted, that a husband may either subject to restrictions, or totally bar his widow's right to dower,

by a declaration in a deed, or in his will. And a devise by a husband of any real estate (liable to dower) to his widow, shall bar her claim to dower out of any other land of her husband, unless a contrary intention shall be declared by his will. Provided, that courts of equity may still enforce any covenant or agreement, entered into by any husband, not to bar the right of his widow to dower.

(26) We seem to have derived the practice of assigning dower to a woman from our Teutonic ancestors; amongst whom it was a rule, as Tacitus informs us, that *dotem non uxor marito, sed uxori maritus offert*.

and Roman laws. Dower out of lands seems also to have been unknown in the early part of our Saxon constitution (27); for, in the laws of King Edmund (*a*), the wife is directed to be supported wholly out of the personal estate. Afterwards, as may be seen in gavelkind tenure, the widow became entitled to a conditional estate in one half of the lands (28); with a proviso that she remained chaste and unmarried (*b*); as is usual also in copyhold dowers (29),

(*a*) Wilk. 75.

(*b*) Somner. Gavelk. 51; Co. Litt. 33; Bro. Dower, 70.

(27) It should seem, on the contrary, that the Saxons, like all the other German nations, were well acquainted with the custom of appointing lands for a widow's dower. In the Appendix to Somner's Treatise on Gavelkind, (p. 195,) we are furnished with a Saxon tripartite deed or charter, containing a nuptial contract and an appointment of certain specified lands for the intended wife's dower.

(28) See Lambard's Archaionomia, p. 60. In another of his works, (Perambulation of Kent,) Lambard contends that a seisin in law, on the part of the husband, is not sufficient to entitle a woman to dower out of gavelkinds. We have seen, however, (*ante*, in note (13) to this chapter,) that seisin in law is sufficient to give her title to dower out of lands not in gavelkind; and Robinson (in his Tr. on Gavelk. 117,) repudiates Lambard's notion that the rule is different where the lands are of gavelkind tenure. (See *ante*, note (22) to p. 128.)

(29) The claim of dower, or of curtesy, out of copyhold lands, can only be supported by custom. (*Brown's case*, 4 Rep. 22 a; *Shaw v. Thompson*, 4 Rep. 30 b; *Cocks v. Darson*, Hob. 215; *Foorde v. Hoskins*, 2 Bulst. 337.)

Most commonly, however, a widow is entitled to her free-bench in those estates only of which her husband died seised. (*Salisbury v. Hurd*, Cowper, 482; *Brown v. Raindle*, 3 Ves. 256;

The King v. Inhabitants of Lopen, 2 T. R. 580; *Godwin v. Winsmore*, 2 Atk. 526; *Hinton v. Hinton*, 2 Ves. sen. 633.) Even a lease for years, granted by the husband, will be sufficient, unless there is a custom to the contrary, to defeat the widow's right of free-bench. (*Farely's case*, Cro. Jac. 36.) But, the custom, it is said, within Taunton Dean, has established a rule, that, on the death of the husband, the wife shall succeed to his whole fee; and, if the wife dies first, the husband shall in like manner have the entire property of her lands. (*Newton v. Shafto*, 1 Keb. 925.) Custom, indeed, is the life and soul of copyhold tenure, with all its incidents; see *ante*, pp. 95, 97. In some manors, free-bench is incident to copyholds, which were granted to the husband for life only; (*Howard v. Bartlet*, Hob. 181;) and in the case last cited it was also resolved, that the right to free-bench attaches before the admission of the husband, upon a descent or surrender.

Where the widow of the ancestor holds a moiety of the copyhold, as her free-bench, the widow of the son will only be entitled to a moiety of the remaining moiety; upon the same principle as that which regulates dower in the like case. (*Baker v. Beresford*, T. Raym. 58.) For, *dos de dote peti non debet*; (Co. Litt. 31 a;) when free-bench determines by the act of God, the widow's representatives will

[* 130]

or free-bench. Yet some (c) have ascribed the introduction of dower to the Normans, as a branch of *their* local tenures; though we cannot expect any feudal reason for its invention, since it was not a part of the pure, primitive, simple law of feuds, but was first of all introduced into that system (wherein it was called *triens*, *tertia* (d), and *dotalitium*) by the Emperor Frederick the second (e); who was contemporary with our king Henry III. It is possible, therefore, that it might be with us the relict of a Danish custom: since, according to the historians of that country, dower was introduced into Denmark by Swein, the father of our Canute the great, out of gratitude to the Danish ladies, who sold all their *jewels to ransom him when taken prisoner by the Vandals (f). However this be, the reason which our law gives for adopting it is a very plain and sensible one; for the sustenance of the wife, and the nurture and education of the younger children (g).

The nature of
this estate.

In treating of this estate, let us, first, consider *who* may be endowed; secondly, of *what* she may be endowed; thirdly, the manner *how* she shall be endowed; and fourthly, how dower may be *barred* or prevented.

1. Who may be
endowed.

1. Who may be endowed. She must be the actual (30)

(c) Wright, 192.

(d) Crag. l. 2, t. 22, s. 9.

(e) Ibid.

(f) Mod. Un. Hist. xxxii. 91.

(g) Bract. l. 2, c. 39; Co. Litt. 30.

be entitled to emblements, as in the case of a freehold estate for life; (as to which see *ante*, p. 122, note;) but when free-bench determines by the act of the widow, as by incontinency, or a second marriage, the emblements go to the lord of the manor. (*Oland's case*, 5 Rep. 116.) A jointure is a good bar to a widow's claim of free-bench, just as it is to a claim of dower; (*Walker v. Walker*, 1 Ves. sen. 55;) and a devise "in full of all dower, or thirds, which the devisor's wife might have or claim right to out of his real estate," was held (in *Warde v. Warde*, Amb. 299,) to extend to the right of free-bench of the devisor's copyholds.

Since this note was first published, the statute of 3 & 4 Gul. IV. c. 105,

has, with respect to women married since the commencement of the year 1834, put it entirely in the power of their husbands whether they shall, or shall not, have *dower*, out of either freehold or copyhold lands: and though the act does not mention *free-bench*, that will probably be held to be included, as every *species* is in its *genus*.

(30) The lawfulness, and even the fact of a marriage, it has been said, can be established in no other way but by the bishop's certificate. (*Robins v. Crutchley*, 2 Wils. 125.) But, when the marriage has not been had within any of our bishop's dioceses, or where, from any particular circumstances, the question seems not proper to be tried by the bishop's certificate;

wife of the party at the time of his decease. If she be divorced *a vinculo matrimonii*, she shall not be endowed; for *ubi nullum matrimonium, ibi nulla dos* (*h*). But a divorce *a mensa et thoro* only doth not destroy the dower (*i*); no, not even for adultery itself by the common law (*k*). Yet now by the statute West. 2. (*l*) if a woman voluntarily leaves (which the law calls eloping from) her husband, and lives with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled to her (*31*). It was formerly held, that the wife of an idiot might be endowed, though the husband of an idiot could not be tenant by the curtesy (*m*): but as it seems to be at present agreed, upon principles of sound sense and reason, that an idiot cannot marry (*32*), being incapable of consenting to any contract, this doctrine cannot now take place. By the ancient law the wife of a person attainted of treason or felony could not be endowed; to the intent, says Staunforde (*n*), that if the love of a man's own life cannot restrain him from such atrocious acts, the love of his wife and children may; though Britton (*o*) gives it another turn: *viz.* that it is presumed the wife was privy to her husband's crime. However, the statute 1 Edw. VI. c. 12, abated the rigour of the common law in this particular, and allowed *the wife her dower. [* 131] But a subsequent statute (*p*) revived this severity against the widows of traitors, who are now barred of their dower

(*h*) Bract. l. 2, c. 39, s. 4.

(*i*) Co. Litt. 32.

(*k*) Yet, among the ancient Goths, an adulteress was punished by the loss of her *dotalitii et trientis ex bonis mobilibus viri*. (Stiernh. l. 3, c. 2.)

(*l*) 13 Edw. I. c. 34.

(*m*) Co. Litt. 31.

(*n*) P. C. b. 3, c. 3.

(*o*) C. 110.

(*p*) 5 & 6 Edw. VI. c. 11.

there, in the language of Chief Justice Eyre, "the common law, out of its own inexhaustible fountain of justice, must derive another mode of trial, and that mode is the trial by the country." (*Ilderton v. Ilderton*, 2 H. Bla. 156.) The same doctrine, founded on obvious good sense, had been previously laid down in the case of *The Protector v. Ashfield*. (Hardr. 62.)

(31) And in a case where John de Camoys had assigned his wife, by deed,

to Sir William Paynel, knight, which Lord Coke calls *concessio mirabilis et inaudita*, it was decided in parliament, a few years after the statute was enacted, notwithstanding the purgation of the adultery in the spiritual court, that the wife was not entitled to dower. (2 Instit. 435.) This is an indictable offence, being a great public misdemeanor. (See Vol. IV. p. 64.—CH.)

(32) See *ante*, p. 127, note.

(except in the case of certain modern treasons relating to the coin) (*q*), but not the widows of felons (33). An alien also cannot be endowed (34), unless she be queen consort; for no alien is capable of holding lands (*r*). The wife must be above nine years old at her husband's death, otherwise she shall not be endowed (*s*): though in Bracton's time the age was indefinite, and dower was then only due "*si uxor possit dotem promereri, et virum sustinere*" (*t*) (35).

(*q*) Stat. 5 Eliz. c. 11; 18 Eliz. c. 1;
8 & 9 Will. III. c. 26; 15 & 16 Geo.
II. c. 28.

(*r*) Co. Litt. 31.

(*s*) Litt. s. 36.

(*t*) L. 2, c. 9, s. 3.

(33) See *ante*, p. 72, note.

(34) This statement is too general: alien women, whose marriage with Englishmen has not taken place with license from the king, are not capable of acquiring dower, for the reason assigned by our author. But, in consequence of a petition from the Commons, an act of Parliament was made in the 8th year of the reign of Henry V. (and which, though it is not printed amongst the statutes, is preserved in the 4th volume of Rot. Parl. pp. 128, 130,) by which all alien women who from thenceforth should be married to Englishmen, by license from the king, are enabled to have dower after their husband's death, in the same manner as English women. And if an alien woman be naturalized, or made a denizen, she thereby becomes entitled to dower. (*Menvil's case*, 13 Rep. 23.)

(35) Lord Coke informs us, that "if the wife be past the age of nine years at the time of her husband's death, she shall be endowed, of what age soever her husband be, albeit he were but *four* years old. *Quia junior non potest dotem promereri, et virum sustinere.*" (Co. Litt. 33.) This we are told by that grave and reverend judge, without any remark of surprise or reprobation. But it confirms the observation of Montesquieu in the Spirit of Laws, b. 26, c. 3: "There has been (says he)

"much talk of a law in England, which permitted girls seven years old to choose a husband. This law was shocking two ways; it had no regard to the time when nature gives maturity to the understanding; nor to the time when she gives maturity to the body." It is abundantly clear, both from our law and history, that formerly such early marriages were contracted as in the present times are neither attempted nor thought of.

This was probably owing to the right which the lord possessed of putting up to sale the marriage of his infant tenant. He, no doubt, took the first opportunity of prostituting the infant to his own interest, without any regard to age or inclinations. And thus what was so frequently practised and permitted by the law, would cease even in other instances to be considered with abhorrence. If the marriage of a female was delayed till she was sixteen, this benefit was entirely lost to the lord, her guardian. [See *ante*, p. 67, note.]

Even the 8 Eliz. c. 7, which makes it a capital crime to abuse a consenting female child under the age of ten years, seems to leave an exception for these marriages, by declaring only *the carnal and unlawful* knowledge of such woman-child to be a felony. Hence the abolition of the feudal wardships and marriage at the restoration may, per-

2. We are next to inquire, of what a wife may be endowed. And she is now by law entitled to be endowed of all lands and tenements, of which her husband was seised in fee-simple or fee-tail, at any time during the coverture; and of which any issue, which she might have had, might by possibility have been heir (*u*). Therefore, if a man seised in fee-simple, hath a son by his first wife, and after marries a second wife, she shall be endowed of his lands; for her issue might by possibility have been heir, on the death of the son by the former wife. But if there be a donee in special tail who holds lands to him and the heirs of his body begotten on Jane his wife; though Jane may be endowed of these lands, yet if Jane dies, and he marries a second wife, that second wife shall never be endowed of the lands entailed; for no issue that she could have, could by any possibility inherit them (*v*). A seisin in law (36) of the husband will be as effectual as a seisin in deed, in order to render the wife dowable; for it is not in the wife's power to bring the husband's title to an actual seisin, as it is in the husband's power to do with regard to the wife's lands: which is one reason why he shall not be tenant by the curtesy, but of such lands whereof the wife, or he himself in her right, was actually seised in deed (*w*). The seisin of the husband, for a transitory instant *only, when the same act which gives him the estate conveys it also out of him again, (as where by a fine land is granted to a man, and he immediately renders it back by the same fine,) such a seisin will not entitle the wife to dower (*x*): for the land was merely *in transitu*, and never rested in the husband; the grant and render being one continued act. But, if the land abides in him for the interval of but a single moment, it seems that the wife shall be endowed thereof (*y*) (37). And, in short,

2. Of what a wife may be endowed.

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(*u*) Litt. s. 36, 53.

(*v*) Litt. s. 53.

(*w*) Co. Litt. 31.

(*x*) Cro. Jac. 615; 2 Rep. 67; Co. Litt. 31.

(*y*) This doctrine was extended very

far by a jury in Wales, where the father and son were both hanged in one cart, but the son was supposed to have survived the father, by appearing to struggle longest; whereby he became seised of an estate in fee by survivor-

haps, have contributed not less to the improvement of the morals than of the liberty of the people.—CH.

(36) See *ante*, the notes to pp. 127, 129; and *post*, p. 137.

(37) In *Sneyd v. Sneyd*, (1 Atk.

a widow may be endowed of all her husband's lands, tenements, and hereditaments, corporeal or incorporeal (38), under the restrictions before mentioned; unless there be some special reason to the contrary. Thus, a woman shall not be endowed of a castle, built for defence of the realm (z): nor of a common without stint; for, as the heir would then have one portion of this common, and the widow another, and both without stint, the common would be doubly stocked (a). Copyhold estates are also not liable to dower, being only estates at the lord's will; unless by the special custom of the manor, in which case it is usually called the widow's free-bench (b) (39). But, where dower is allowable, it matters not though the husband aliene the lands during the coverture; for he alienes them liable to dower (c) (40).

3. Of the manner in which a woman is to be endowed; and the different species of dower.

3. Next, as to the manner in which a woman is to be endowed. There are now subsisting four species of dower; the fifth, mentioned by Littleton (d), *de la plus belle*, having been abolished together with the military tenures, of which it was a consequence. 1. Dower by the *common law*; or that which is before described. 2. Dower by particular

ship, in consequence of which seisin his widow had a verdict for her dower. (Cro. Eliz. 503.)
(z) Co. Litt. 31; 3 Lev. 401.

(a) Co. Litt. 32; 1 Jon. 315.
(b) 4 Rep. 22.
(c) Co. Litt. 32.
(d) S. 48, 49.

442,) it was considered to be a new point, untouched by actual decision, whether, if a man became entitled to lands by copy of court-roll, and (being lord of the manor) granted them out again by copy of court-roll, not by leases for years, his widow was entitled to dower out of those estates? Sir Joseph Jekyll, M. R. determined that she was not.

A feoffment by tenant for life gives a (voidable) fee to his alienee, but that fee never was in such feoffor; therefore his widow will not be dowerable out of the lands after the fee is avoided for the forfeiture. But, as against the feoffee, the widow may claim dower, and he will be precluded by estoppel from denying her title.

(*Matthew Taylor's case*, cited in *Blundell v. Baugh*, W. Jones, 317.)

(38) Our author, we may be sure, did not mean to intimate that a widow was entitled to dower out of *all* her husband's incorporeal hereditaments, of what nature soever; but only out of such incorporeal hereditaments as savour of the realty. (*Buckeridge v. Ingram*, 2 Ves. jun. 664.) That a widow was formerly dowerable out of such lands only as her husband had *legal* seisin of, see *post*, the note to p. 137; but this distinction has been done away, by the second section of the statute of 3 & 4 Gul. IV. c. 105.

(39) See *ante*, the note to p. 129.

(40) But see, now, the statute cited in the last note but one.

custom (e); as that the wife should have half the husband's lands, or in some places the whole (41), and in some only a quarter. 3. Dower *ad ostium ecclesiæ (f)* (42): which is where tenant in fee *simple of full age, openly at the church door, where all marriages were formerly celebrated, after affiance made and (Sir Edward Coke in his translation of Littleton, adds) troth plighted between them, doth endow his wife with the whole, or such quantity as he shall please, of his lands; at the same time specifying and ascertaining the same; on which the wife, after her husband's death, may enter without farther ceremony. 4. Dower *ex assensu patris (g)*; which is only a species of dower *ad ostium ecclesiæ*, made when the husband's father is alive, and the son, by his consent expressly given, endows his wife with parcel of his father's lands. In either of these cases, they must (to prevent frauds) be made *(h) in facie ecclesiæ et ad ostium ecclesiæ; non enim valent facta in lecto mortali, nec in camera, aut alibi ubi clandestina fuere conjugia.* [* 133]

It is curious to observe the several revolutions which the doctrine of dower has undergone, since its introduction into England. It seems first to have been of the nature of the dower in gavelkind, before mentioned; *viz.* a moiety of the husband's lands, but forfeitable by incontinency or a second marriage. By the famous charter of Henry I., this condition of widowhood and chastity was only required in case the husband left any issue *(i)*: and afterwards we hear no more of it. Under Henry the second, according to Glanvil *(k)*, the dower *ad ostium ecclesiæ* was the most usual species of dower; and here, as well as in Normandy *(l)*, it was binding upon the wife, if by her consented to at the time of marriage. Neither, in those days of feudal rigour, was the husband allowed to endow her *ad ostium ecclesiæ* with more than the third part of the lands whereof he then

Of the various alterations in the common law mode of ascertaining dower.

(e) Litt. s. 37.

(f) Litt. s. 39.

(g) Ibid. s. 40.

(h) Bracton, l. 2, c. 39, s. 4.

(i) *Si mortuo viro uxor ejus remanserit, et sine liberis fuerit, dotem suam habebit,—si vero uxor cum li-*

beris remanserit, dotem quidem habebit, dum corpus suum legitime servaverit. (Cart. Hen. I. A. D. 1101; Introd. to Great Charter, edit. Oxon. pag. iv.)

(k) L. 6, c. 1 & 2.

(l) Gr. Coustum. c. 101.

(41) See *ante*, note to p. 129.

(42) Dower *ad ostium ecclesiæ*, and

dower *ex assensu patris*, are both abolished by stat. 3 & 4 Gul. IV. c. 105, s. 13.

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was seised, though he might endow her with less : lest by such liberal endowments the lord should be defrauded of his wardships and other feudal profits (*m*). But if no specific dotation was made at the *church porch, then she was endowed *by the common law* of the third part (which was called her *dos rationabilis*) of such lands and tenements, as the husband was seised of at the time of the espousals, and no other ; unless he specially engaged before the priest to endow her of his future acquisitions (*n*) : and if the husband had no lands, an endowment in goods, chattels, or money, at the time of espousals, was a bar of any dower (*o*) in lands which he afterwards acquired (*p*). In King John's *magna carta*, and the first charter of Henry III. (*q*), no mention is made of any alteration of the common law, in respect of the lands subject to dower : but in those of 1217, and 1224, it is particularly provided, that a widow shall be entitled for her dower to the third part of *all* such lands as the husband had held in his lifetime (*r*) : yet, in case of a specific endowment of less *ad ostium ecclesiæ*, the widow had still no power to waive it after her husband's death. And this continued to be law, during the reigns of Henry III. and Edward I. (*s*).

(*m*) Bract. l. 2, c. 39, s. 6.

(*n*) *De questu suo*. (Glan. ib.)—*de terris acquisitis et acquirendis*. (Bract. ib.)

(*o*) Glanv. c. 2.

(*p*) When special endowments were made *ad ostium ecclesiæ*, the husband, after affiance made, and troth plighted, used to declare with what specific lands he meant to endow his wife, (*quod dotat eam de tali manerio cum pertinentiis, &c.* Bract. ibid,) and therefore, in the old York ritual (Seld. Ux. Hebr. l. 2, c. 27,) there is, at this part of the matrimonial service, the following rubric : “ *sacerdos interroget dotem mulieris ; et si terra ei in dotem detur, tunc dicatur psalmus iste, &c.*” When the wife was endowed generally (*ubi quis uxorem suam dotaverit in generali, de omnibus terris et tenementis*. Bract. ib.), the husband seems to have said, “ with all my “ lands and tenements I thee endow ;” and then they all became liable to her

dower. When he endowed her with personalty only, he used to say, “ with “ all my worldly goods (or, as the “ Salisbury ritual has it, *with all my “ worldly chattel*) I thee endow ;” which entitled the wife to her thirds, or *pars rationabilis*, of his personal estate, which is provided for by *magna carta*, cap. 26, and will be farther treated of in the concluding chapter of this book ; though the retaining this last expression in our modern liturgy, if of any meaning at all, can now refer only to the right of maintenance, which she acquires during coverture, out of her husband's personalty.

(*q*) A. D. 1216, c. 7, edit. Oxon.

(*r*) *Assignetur autem ei pro dote sua tertia pars totius terræ mariti sui quæ sua fuit in vita sua, nisi de minori dotata fuerit ad ostium ecclesiæ*. c. 7. (Ibid.)

(*s*) Bract. *ubi supra* ; Britton, c. 101, 102 ; Flet. l. 5, c. 23, s. 11, 12.

In Henry IV.'s time it was denied to be law, that a woman can be endowed of her husband's goods and chattels (*t*): and, under Edward IV., Littleton lays it down *expressly, [* 135] that a woman may be endowed *ad ostium ecclesiæ* with more than a third part (*u*); and shall have her election, after her husband's death, to accept such dower or refuse it, and betake herself to her dower at common law (*w*). Which state of uncertainty was probably the reason, that these specific dowers, *ad ostium ecclesiæ* and *ex assensu patris*, have since fallen into total disuse.

I proceed, therefore, to consider the method of endowment, or assigning dower by the common law, which is now the only usual species. By the old law, grounded on the feudal exactions, a woman could not be endowed without a fine paid to the lord; neither could she marry again without his license; lest she should contract herself, and so convey part of the feud to the lord's enemy (*x*). This license the lords took care to be well paid for; and, as it seems, would sometimes force the dowager to a second marriage, in order to gain the fine. But to remedy these oppressions, it was provided, first by the charter of Henry I. (*y*), and afterwards by *magna carta* (*z*), that the widow shall pay nothing for her marriage, nor shall be distreined to marry afresh, if she chooses to live without a husband, but shall not, however, marry against the consent of the lord; and farther, that nothing shall be taken for the assignment of the widow's dower, but that she shall remain in her husband's capital mansion-house for forty days after his death (43), during which time her dower shall be assigned. These forty days are called the widow's *quarentine*; a term made use of in law to signify the number of forty days, whether applied to this occasion, or any other (*a*). The particular

Of the mode of investiture or assignment of dower now in use.

(*t*) P. 7 Hen. IV. 13, 14.

(*u*) Sec. 39. F. N. B. 150.

(*w*) Sec. 41.

(*x*) Mirr. c. 1, s. 3.

(*y*) *Ubi supra*.

(*z*) Cap. 7.

(*a*) It signifies, in particular, the forty days, which persons coming from infected countries are obliged to wait, before they are permitted to land in England.

(43) Lord Coke thought it necessary to qualify this doctrine, by limiting its application to cases where the widow's affectionate regret is so exces-

sive, as to prevent her from marrying again *within the forty days*. (Co. Litt. 34 b.)

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lands, to be held in dower, must be assigned (*b*) by the heir of the husband, or his guardian (44); not only for the sake of notoriety, but also to entitle the lord of the fee to demand his services of the heir, in respect of the lands so holden. For the heir by this entry becomes tenant *thereof to the lord, and the widow is immediate tenant to the heir, by a kind of subinfeudation, or under-tenancy completed by this investiture or assignment; which tenure may still be created, notwithstanding the statute of *quia emptores*, because the heir parts not with the fee-simple, but only with an estate for life. If the heir or his guardian do not assign her dower within the term of quarantine, or do assign it unfairly, she has her remedy at law (45), and the sheriff is appointed to assign it (*c*). Or if the heir (being under age) or his guardian assign more than she ought to have, it may be afterwards remedied by writ of *admeasurement* of dower (*d*). If the thing of which she is endowed be divisible, her dower must be set out by metes and bounds; but if it be indivisible, she must be endowed specially; as of the third presentation to a church, the third toll-dish of a mill, the third part of the profits of an office, the third sheaf of tithe, and the like (*e*).

Of jointure in
lieu of dower.

Upon preconcerted marriages, and in estates of consi-

(*b*) Co. Litt. 34, 35.

Stat. Westm. 2, 13 Edw. I. c. 7.

(*c*) Ibid.

(*e*) Co. Litt. 32.

(*d*) F. N. B. 148; Finch, L. 314;

(44) "Or other tenant of the land." (Co. Litt. 34 b.) Of course this *dictum* of Lord Coke must now be understood as applicable only to tenants of the *freehold*. The only case in which a writ of dower lay against, or in which an assignment of dower could be made by, a person having only a chattel interest in the lands out of which the dower was claimed, was a guardian in chivalry. And this was allowed, because the tenant in dower would otherwise have been without remedy. (*Brediman's case*, 6 Rep. 58.) Therefore, now that all guardianship in chivalry is abolished, the rule is universal, that the person assigning dower must be seised of the freehold; (Perk.

sect. 404;) though such assignment may be made by a person in possession of a *tortious* estate of freehold; and, if the assignment be a fair one in all respects, and such as the lawful tenant, if he had been in possession, ought to have made, it will be binding on him. (Perk. sect. 394, 395.)

(45) Where the *right* to dower is controverted, it must be made out at law; but if the right be not controverted, the Court of Chancery has a concurrent jurisdiction in matters of dower, and will act in aid of the admitted legal title. (*Mundy v. Mundy*, 2 Ves. jun. 129.)

derable consequence, tenancy in dower happens very seldom: for the claim of the wife to her dower at the common law diffusing itself so extensively, it became a great clog to alienations, and was otherwise inconvenient to families. Wherefore, since the alteration of the ancient law respecting dower *ad ostium ecclesiæ*, which hath occasioned the entire disuse of that species of dower, jointures have been introduced in their stead, as a bar to the claim at common law. Which leads me to inquire, lastly,

4. How dower may be *barred* or prevented. A widow may be barred of her dower not only by elopement, divorce, being an alien, the treason of her husband, and other disabilities before mentioned, but also by detaining the title deeds, or evidences of the estate from the heir, until she restores them (*f*): and, by the statute of Gloucester (*g*), if a dowager alienes (46) the land assigned her for dower, she forfeits it *ipso facto*, and the heir may recover it by action. [* 137] A woman also may be barred of her dower, by levying a fine, or suffering a recovery of the lands, during her coverture (*h*). But the most usual method of barring dowers is by jointures, as regulated by the statute 27 Hen. VIII. c. 10.

4. The mode of barring dower.

A jointure, which, strictly speaking, signifies a joint estate, limited to both husband and wife, but in common acceptance extends also to a sole estate, limited to the wife only, is thus defined by Sir Edward Coke (*i*): “ a competent livelihood of freehold for the wife, of lands and tenements; to take effect, in profit or possession, presently after the death of the husband; for the life of the wife at least.” This description is framed from the purview of the statute 27 Hen. VIII. c. 10, before mentioned, commonly called the statute of *uses*, of which we shall speak fully hereafter. At present I have only to observe, that before the making of that statute, the greatest part of the land of England was

Of the nature of jointure—

(*f*) Co. Litt. 39.

(*h*) Pig. of Recov. 66.

(*g*) 6 Edw. I. c. 7.

(*i*) 1 Inst. 36.

(46) By the letter of the statute, forfeiture was incurred by alienation in fee, or for *term of life*; but Lord Coke informs us, (in 2nd Inst. 309,) the words “ term of life” are here intend-

ed of an estate for the term of the life of a stranger, and not for the life of the tenant in dower herself, for that could work no wrong.

conveyed to uses; the property or possession of the soil being vested in one man, and the *use*, or profits thereof, in another; whose directions, with regard to the disposition thereof, the former was in conscience obliged to follow, and might be compelled by a court of equity to observe. Now, though a husband had the *use* of lands in absolute fee-simple, yet the wife was not entitled to any dower therein; he not being *seised* thereof: wherefore it became usual, on marriage, to settle by express deed some special estate to the use of the husband and his wife, for their lives, in joint-tenancy, or jointure; which settlement would be a provision for the wife in case she survived her husband. At length the statute of uses ordained, that such as had the *use* of lands should, to all intents and purposes, be reputed and taken to be absolutely *seised* and possessed of the soil itself. In consequence of which legal seisin (47), all wives would have become dowable of such lands as were held to the use of their husbands, and also entitled at the same time to any special lands that might be settled in jointure: had not the same statute provided that *upon making such an estate in jointure to the wife before marriage (48), she shall be for ever precluded from her dower (*k*). But then these four requisites must be punctually observed: 1. The jointure must take effect immediately on the death of the husband (49). 2. It

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—1. Must take effect immediately on the death of the husband.—

2. Must be for

(*k*) 4 Rep. 1, 2.

(47) It was formerly established doctrine, that a wife was not dowable of a *trust* estate. (*Godwin v. Winsmore*, 2 Atk. 526; *Attorney General v. Scott*, Ca. temp. Talb. 139.) Yet, a man might then, as now, be tenant by the curtesy of his deceased wife's trust estate, (*Watts v. Ball*, 1 P. Wms. 108,) a seemingly partial diversity, for which Lord Talbot, C., said, he could see no reason; but which, as he found it settled, he did not feel himself at liberty to correct. (*Chaplin v. Chaplin*, 3 P. Wms. 234.) The late statute, however, of 3 and 4 Gul. IV. c. 105, has abolished this anomaly; though it has, on the other hand, placed every woman's hope of dower entirely at the mercy of her husband.

(48) The statute provides, that if a jointure is made *after* marriage, otherwise than by act of Parliament, the *feme*, if she survives her husband, shall be at liberty to elect between such jointure and her dower.

(49) A provision, created so as to begin after the determination of an estate tail, will not be considered as a good jointure; although that estate tail may, in the event, determine at the death of the husband, so that the widow's estate will begin at the regular time: but not having been a good jointure at the time of its creation, subsequent contingencies will not make it good. (*Wood v. Shurley*, Cro. Jac. 489.)

must be for her own life at least, and not *pur auter vie*, or for any term of years, or other smaller estate (50). 3. It must be made to herself, and no other in trust for her (51). 4. It must be made, and so in the deed particularly expressed to be (52), in satisfaction of her whole dower, and not of any particular part of it. If the jointure be made to her *after* marriage, she has her election after her husband's death, as in dower *ad ostium ecclesiæ*, and may either accept it, or refuse it and betake herself to her dower at common law; for she was not capable of consenting to it during coverture (53). And if, by any fraud or accident, a jointure

the life of the wife at least.—

3. Must be made to herself, and not to another in trust for her.—

4. Must be in satisfaction of her whole dower, and not of a part of it.

(50) It seems, however, that if the continuance of the widow's estate during her life be made to depend upon herself, such a qualified or conditional freehold may be a good legal jointure; and if the widow has once accepted it after her husband's death, she cannot afterwards, when by her own act she has defeated her conditional estate, turn round and claim her dower. (*Vernon's case*, 4 Rep. 3 a.) And, even before the late statute, where a woman was adult at the time she agreed to a jointure in satisfaction of dower, she was bound by the acceptance of a precarious interest. (*Carruthers v. Carruthers*, 4 Br. 513; *Simpson v. Gutteridge*, 1 Mad. 613, 618.)

(51) But, it seems, that if the estate be limited to the husband and wife in fee-simple, the jointure will be as valid as if it were limited to the widow solely. (*Dame Dennis's case*, Dyer, 248 a; *Vernon's case*, 4 Rep. 3 b; *Duchess of Somerset's case*, Dyer, 97 b.)

(52) Mr. Christian, in his annotation upon this passage of the text, says, "Or it may be *averred* to be, 4 Rep. 3. An assurance was made to a woman, to the intent it should be for her jointure, but it was not so expressed in the deed. And the opinion of the court was, that it might be averred that it was for a jointure, and that such averment was traversable. Owen, 33."

[These authorities are correctly cited, but they are both antecedent to the Statute of Frauds, which expressly enacts, that no estates or interests of freehold shall be surrendered unless by deed or note *in writing*; but if it were allowed to be proved by oral testimony, that a provision for a wife was intended as a jointure; the effect would be, to allow a surrender of her freehold title to dower to be proved by parol testimony, and there have been several decisions, since the statute, that such averment is not admissible. (*Charles v. Andrews*, 9 Mod. 152; *Tinney v. Tinney*, 3 Atk. 8.) But it certainly is not necessary (in equity at least) that the provision for the wife should be stated, in express words, to be in lieu of dower, if it can be *clearly* collected, from the contents of the instrument, that such was the intention. (*Vizard v. Longdale*, cited in 3 Atk. 8, and in 1 Ves. sen. 55.) A court of equity will be cautious, however, as to inferring an intention that a widow should be barred of dower by another provision, when that intention is not distinctly manifested. (*Lord Dorchester v. Lord Effingham*, Coop. 323; and see the next note.—ED.)

(53) See *ante*, the first note to this page. It was well established, as general doctrine, (before the late act, so often cited within the last few pages,) that since dower is a legal right, the intention to exclude that

made before marriage proves to be on a bad title, and the jointress is evicted, or turned out of possession, she shall

right, by a *devise or bequest* of something else, must be demonstrated, if not by express words, at least by (what appears to the court to amount to) necessary implication. It was only where the claim of dower would be inconsistent with the will, or plainly tend to defeat some other part of the testator's disposition of his property, that the widow could be compelled to elect, whether she would take her dower, or the interest devised to her. (*Strahan v. Sutton*, 3 Ves. 252 ; *Thompson v. Nelson*, 1 Cox, 447.) Acceptance of a bequest of personalty neither did, nor since the late statute does, operate in bar of dower, unless an intention to that effect can be unequivocally established ; (*Ayres v. Willis*, 1 Ves. sen. 230 ;) but a devise to the testator's widow of part of those lands out of which she might claim dower, formerly did not exclude that claim with respect to the remainder of such lands ; (*Lawrence v. Lawrence*, 1 Br. P. C. 591 ; *S. C.* 2 Freem. 234 ; *Lord Dorchester v. Lord Effingham*, Coop. 324 ; *Hitchins v. Hitchins*, 2 Freem. 241 ;) unless the terms of the devise expressed, or clearly implied it was the testator's intent, that the bequest of part of the lands, if accepted, should be in satisfaction of dower out of the remainder ; (*Chalmers v. Storil*, 2 Ves. & Bea. 224 ; *Dickson v. Robinson*, Jacob's Rep. 503 ;) now, however, the law in this respect is altered : a devise by a husband to his widow of any land out of which she might have been entitled to dower if there had been no devise thereof, bars her title to dower out of any part of her said husband's land, unless he has expressly declared a contrary intention by his will. However, a devise of a *contingent remainder* to a woman for life, in the whole of the lands out of which her dower is de-

mandable, probably will not, by implication, exclude her *immediate title* to dower : for there is nothing inconsistent in the two interests. (*Incedon v. Northcote*, 3 Atk. 435.)

Courts of equity exercise a jurisdiction in relieving or assisting jointresses, and in supplying defects in the execution of jointuring powers. If a jointure rests in articles, or covenant, made before marriage, equity will decree a specific performance of such articles, or covenant, (although the wife has eloped with an adulterer,) by directing a settlement which will have relation to the period when it ought to have been made. (*Sidney v. Sidney*, 3 P. Wms. 276 ; *Seagrave v. Seagrave*, 13 Ves. 443 ; *Jee v. Thurlow*, 2 Barn. & Cress. 553 ; 4 Dowl. & Ryl. 21 ; *Buchanan v. Buchanan*, 1 Ball & Beat. 206 ; *Legard v. Johnson*, 3 Ves. 360.)

A widow will also be assisted, by equity, in subjecting her husband's assets to make good any deficiency in her jointure, when he has engaged that it should be of a certain amount. (*Probert v. Morgan*, 1 Atk. 440 ; *Prime v. Stebbing*, 2 Ves. sen. 411 ; *Speake v. Speake*, 1 Vern. 218.) And, if the widow be evicted of her jointure by a superior title, it has been held that her husband's estate will be liable, in equity, to answer the difference between her dower (to which she may revert) and the jointure. (*Beard v. Nuthall*, 1 Vern. 428.)

Though whenever, at the creation of powers, certain formalities of execution are prescribed, those formalities ought in strictness to be closely pursued ; still, if a person, having a power, executes an instrument for valuable consideration, (and marriage is so considered,) he is understood, *in equity*, to engage with the person with whom he is dealing, to make the instrument as effectual as he has power

then (by the provisions of the same statute) have her dower *pro tanto* at the common law (l).

There are some advantages attending tenants in dower that do not extend to jointresses ; and so, *vice versa*, joint-

Of the relative advantages of dower and jointure.

(l) These settlements, previous to marriage, seem to have been in use among the ancient Germans, and their kindred nation the Gauls. Of the former, Tacitus gives us this account. "*Dotem non uxor marito, sed uxori maritus affert; intersunt parentes et propinqui, et munera probant.*" (de Mor. Germ. c. 18.) And Cæsar (de Bello Gallico, l. 6, c. 18,) has given us the terms of a marriage settlement among the Gauls, as nicely calculated as any modern jointure. "*Viri, quantas pecunias ab uxoribus dotis nomine acceperunt, tantas ex suis*

"bonis, æstimatione facta, cum dotibus communicant. Hujus omnis pecuniæ conjunctim ratio habetur, fructusque servantur. Uter eorum vita superavit, ad eum pars utriusque cum fructibus superiorum temporum pervenit." The dauphin's commentator on Cæsar supposes that this Gaulish custom was the ground of the new regulations made by Justinian (Nov. 97,) with regard to the provision for widows among the Romans: but surely there is as much reason to suppose, that it gave the hint for our statutable jointures.

to make it, and if the instrument, though not such as the power prescribes, demonstrates an intent to charge, it will be decreed to have the operation of charging in that form which the power allows. (*Blake v. Marnell*, 2 Ball & Beat. 44.) Thus, if a jointuring power ought to have been executed by deed, but has been executed by will, the jointure will be supported. (*Tollet v. Tollet*, 2 P. Wms. 490; *Sneed v. Sneed*, Ambl. 64.) Or if the instrument ought to have been attested by three witnesses, whereas it is attested by two only, equity will relieve against this defective execution. (*Parker v. Parker*, Rep. in Eq. 168; *Cotter v. Layer*, 2 P. Wms. 625; *Shannon v. Bradstreet*, 1 Sch. & Lef. 60.)

Where a widow has accepted, and continued in the enjoyment of an interest, between which and her title to dower, she might have elected; that election, though she has not expressly declared it, will be fairly inferred from such circumstances; (*Ardesoife v. Bennet*, 2 Dick. 467;) and her partial accession to a settlement may be held

an election to abide by the whole. (*Milner v. Lord Harewood*, 17 Ves. 277.) But, generally speaking, acts done by a party before he, or she, is fully informed of his, or her, rights, will not amount to an election. (*Pasey v. Desbouverie*, 3 P. Wms. 321; *Chalmers v. Storil*, 2 Ves. & Bea. 225; *Dillon v. Parker*, 1 Swanst. 381; *Whistler v. Webster*, 2 Ves. jun. 371; *Edwards v. Morgan*, M'Clel. 551.)

A trust estate may constitute a good equitable jointure in bar of dower: and if a jointure be made of freehold estates in trust for an infant, this will, in equity, be a bar to her claim of dower. It was, indeed, once doubted whether a jointure, however formal, settled on an infant before marriage, was a bar to dower; but it has been determined that such a jointure is binding upon the infant, who cannot waive it after her husband's death, and claim her dower. (*Earl of Buckinghamshire v. Drury*, 2 Eden, 73.)

And since the act of 3 & 4 Gul. IV. c. 105, the jointure deed must be strangely drawn if this question can arise.

[* 139] tresses are in some respects more privileged than tenants in dower. Tenant in dower by the old common law is subject to no tolls or taxes; and hers is almost the only estate on which, when derived from the king's debtor, the king cannot distrein for his debt; if contracted during the coverture (*m*). But, on the other *hand, a widow may enter at once, without any formal process, on her jointure land; as she also might have done on dower *ad ostium ecclesiæ*, which a jointure in many points resembles; and the resemblance was still greater, while that species of dower continued in its primitive state: whereas no small trouble, and a very tedious method of proceeding, is necessary to compel a legal assignment of dower (*n*). And, what is more, though dower be forfeited by the treason of the husband, yet lands settled in jointure remain unimpeached to the widow (*o*). Wherefore Sir Edward Coke very justly gives it the preference, as being more sure and safe to the widow, than even dower *ad ostium ecclesiæ*, the most eligible species of any.

(*m*) Co. Litt. 31 a; F. N. B. 150.

(*n*) Co. Litt. 36.

(*o*) Ibid. 37.

CHAPTER IX.

OF ESTATES LESS THAN FREEHOLD.

OF estates that are less than freehold, there are three sorts : There are three sorts of estates that are less than freehold.

1. Estates for years ; 2. Estates at will ; 3. Estates by sufferance.

I. An estate for *years* is a contract for the possession of lands or tenements, for some determinate period ; and it takes place where a man letteth (1) them to another for the term of a certain number of years, agreed upon between the lessor and the lessee (*a*), and the lessee enters there-

I. An estate for years—which is a contract for the possession of lands or tenements, for some determinate period.

(*a*) We may here remark, once for all, that the terminations of “— or” and “— ee” obtain, in law, the one an active, the other a passive signification ; the former usually denoting the doer of any act, the latter, him to whom it is done. The feoffor is he that maketh a feoffment ; the feoffee is he to whom it is made : the donor is one that giveth lands in tail ; the donee is he who receiveth it : he that granteth a lease is denominated the lessor ; and he to whom it is granted the lessee. (Litt. s. 57.)

(1) Of course our author will be understood to put this case of letting, only as a particular instance of one mode in which an estate for years may be created. (See *post*, p. 143.) There are obviously various ways in which such an estate may arise. Thus, where a person devises lands to his executors, for payment of his debts, or until his debts are paid, the executors take an estate, not of freehold, but for so many years as are necessary to raise the sum required. (*Carter v. Barnardiston*, 1 P. Wms. 509 ; *Hitchens v. Hitchens*, 2 Vern. 404 ; *S. C.* 2 Freem. 242 ; *Doe v. Simpson*, 5 East,

171 ; *Doe v. Nicholls*, 1 Barn. & Cress. 342 ; 2 Dowl. & Ryl. 488.) Though, in such case, if a gross sum ought to be paid at a fixed time, and the annual rents and profits will not enable them to make the payment within that time, the Court of Chancery will direct a sale or mortgage of the estate, as circumstances may render one course or the other most proper. (*Berry v. Askham*, 2 Vern. 26 ; *Sheldon v. Dormer*, 2 Vern. 311 ; *Green v. Belchier*, 1 Atk. 506 ; *Allan v. Backhouse*, 1 Ves. & Bea. 75 ; *Bootle v. Blundell*, 1 Meriv. 233.)

on (b). If the lease be but for half a year or a quarter, or any less time, this lessee is respected as a tenant for years, and is stiled so in some legal proceedings; a year being the shortest term which the law in this case takes notice of (c). And this may, not improperly, lead us into a short digression, concerning the division and calculation of time by the English law.

Of the division
of time.

[* 141]

The space of a year is a determinate and well-known period, consisting commonly of 365 days: for, though in bissextile or leap-years it consists properly of 366, yet, by the statute 21 Hen. III. the increasing day in the leap-year, together with the preceding day, shall be accounted for one day only. That of a month is more ambiguous: there being, in common use, two ways of calculating months; either as lunar, consisting of twenty-eight days, the supposed revolution of the moon, thirteen of which make a year: or, as calendar months of unequal lengths, according to the Julian division in our common almanacks, commencing at the calends of each month, whereof in a year there are only twelve. A month in law is a lunar month, or twenty-eight days, unless otherwise expressed; not only because it is always one uniform period, but because it falls naturally into a quarterly division by weeks. Therefore a lease for "twelve months" is only for forty-eight weeks: but if it be for a "*a* twelvemonth" in the singular number, it is good for the whole year (d). For herein the law recedes from its usual calculation, because the ambiguity between the two methods of computation ceases; it being generally understood that by the space of time called thus, in the singular number, a twelvemonth, is meant the whole year, consisting of one solar revolution (2). In the space of a day, all the twenty-four

(b) Litt. 58.

(c) Ibid. 67.

(d) 6 Rep. 61.

(2) Mr. Christian, in his note upon the passage in the text, observes, that "in all statutes a *month* signifies a lunar month, unless it appears to be clearly intended to be a calendar month." And he cites, as his authority, the case of *Lacon v. Hooper*, (6 T. R. 226,) where Lord Kenyon says, that the calculation by calendar, instead of lunar months, in the instance

of a *quare impedit*, depends upon the use of the words *tempus semestre* in the act of 13 Edw. I. st. 1, c. 5. But, in *Lang v. Gale*, (1 Maul. & Sel. 117,) Mr. Justice Le Blanc observed, in matters temporal, the term "*month*" is understood to mean lunar month, whilst in matters ecclesiastical it is deemed calendar, because in each of these matters a different mode of com-

hours are usually reckoned, the law generally rejecting all

putation respectively prevails: (see *post*, p. 276 :) the term therefore is taken in that sense which is conformable to the subject matter to which it is applied. Still, in matters of contract, the question will ever be, what was the intention of the contracting parties at the time when they made use of the word. And in the case just cited, though it related solely to a temporal matter, it was held that the word "months" meant calendar, not lunar months. The usage of computing months as calendar months, in all questions touching ecclesiastical matters, was recognised in *Crooke v. M'Tavish*, (1 Bing. 310,) and in *Cockell v. Gray*, (3 Brod. & Bing. 186,) the rule, that the meaning of the word "month" must depend on the intention of the contracting parties who use it, was held to be clear; and the court adduced many instances in commercial matters, where a calendar month is always intended, as in bills of exchange, payable so many months after date, or in insurances effected for so many months. And it is too general an assertion to say, that, in the construction of statutes, the word "month" must always be understood to mean a lunar month, unless it appears clear that a calendar month was intended: it rather seems to be the practice to make a different exposition of the word, whenever by so doing the penalties or forfeitures declared by a statute will be avoided. (*Davy v. Salter*, 3 Salk. 346; *The King v. Cussens*, 1 Sid. 186; *Biddulph v. St. John*, 2 Sch. & Lef. 529; *Dowling v. Foxall*, 1 Ball & Beat. 195; *Burton v. Woodward*, 4 Mod. 96.)

Mr. Christian further observes, that "it is somewhat remarkable that the difference between six calendar months and half a year does not seem to have been considered by legal writers. Lord Coke says, half a year consists of 182

days. (1 Inst. 135.) But six calendar months will be one or two days less or more than half a year, accordingly as February is reckoned, or not, one of the six. Lord Coke, in his report of *Catesby's case*, clearly considers the *tempus semestre* to be six calendar months; (6 Co. 61;) yet Sir George Croke, in his report of that case, states it as confidently to consist of 182 days; and in neither report is the difference taken notice of. Cro. Jac. 167." But, in the report of the same case in Yelverton, (p. 100,) it is distinctly stated, "for the odd day in the division of the year into halves, the law does not regard it," which is in conformity with the opinion of the Court of Common Pleas, (as reported in Dyer, 345 a,) who held, that "91 days make a quarter of a year, and to the 6 hours over the law pays no regard." And, upon the occasion cited, an old book of the Exchequer was shown, containing the following note: "every quarter of a year containing in it ninety and one days, which make 13 weeks; and half a year containing 182 days; but the year 365 days and 52 weeks." It should be observed, that *Catesby's case*, which Mr. Christian alludes to, was a case of *quare impedit*, brought to contest a bishop's right to collate to a living; and we have seen, that in such, and in all other ecclesiastical questions, the computation is to be made by calendar months. Mr. Christian further mentions, that, "from the cases in 3 Wils. 25, and 1 T. R. 159, it appears that a notice to a tenant from year to year to quit the premises, must be half a year, and not six calendar months, though the computation by the latter would be more simple and convenient; and that was understood to be the proper notice by the Court of Common Pleas, in 2 Bl. Rep. 1224." But in *Doe v. Spence*, (6 East, 123,) Lord

fractions of a day, in order to avoid disputes (e) (3). Therefore, if I am bound to pay money on any certain day, I discharge the obligation if I pay it before twelve o'clock at night; after which the following day commences (4). But to return to estates for years.

(e) Co. Litt. 135.

Ellenborough said, that the rule of law, which originally was, that a tenant was entitled to *reasonable* notice to quit his occupancy, received a precise construction so long ago as in the reign of Henry VIII., in a case in the Year Books, deciding that it should be *half a year's* notice (and see *post*, p. 147). The usage of a particular district, however, where the contract between landlord and tenant is entirely silent on the subject, may make a shorter notice sufficient. (*Webb v. Plummer*, 2 Barn. & Ald. 750; *Brown v. Burtinshaw*, 7 Dowl. & Ryl. 610; *Senior v. Armytage*, Holt's N. P. C. 199).

(3) In *Ex parte Dufresne*, (1 Ves. & Bea. 54,) it was held, as it had previously been in *Wydown's case*, (14 Ves. 88,) that a commission of bankruptcy may be sustained, if it appear that the act of bankruptcy was committed on a previous part of the same day on which the commission was sealed. It is certain, however, that our law rejects fractions of a day more generally than the civil law does. In our ordinary courts the day is, for most legal purposes, considered as a sort of indivisible point, so that no act done in the compass of it is more referrible to one than to another portion thereof: (*Lester v. Garland*, 15 Ves. 257; *Reynolds v. Nelson*, 5 Mad. 61; *Fox v. Morewood*, 2 Sim. & Stu. 326 :) but there are cases in which it may be absolutely necessary to determine the rights of the parties by their actual priority on one and the same day. (*Ex parte D'Obree*, 1 Ves. 83.) It was held in *Dowling v. Foxall*, (1 Ball &

Beat. 196,) as well as in *Ex parte Fallon*, (5 T. R. 287,) that whenever a right would be divested, or a forfeiture incurred, by including the day when an act was done, the computation will be made exclusive of it; and, on the other hand, in construing that section of the statute of 6 Geo. IV. c. 16, which enacts that all conveyances by a bankrupt shall be invalid, unless made more than two months before the issuing of the commission, it has been determined, that where, under that statute, time is to be computed from an act done, the day on which the act is done should be included in the computation: and, upon this principle, a mortgage executed on the 18th of February by one, against whom a commission issued on the 18th of April following, was declared to be valid, and within the protection of the statute. (*Ex parte Farquhar*, 1 Mont. & M'Arth. 8. And see *ante*, the note to Vol. I. p. 463.)

(4) The application of the rule laid down in the text has never been disputed as concerning ordinary contracts; but it has been made a question, whether there be or not a difference between bills of exchange and other contracts, in this respect: (*Leftly v. Mills*, 4 T. R. 173; *Haynes v. Birks*, 3 Bos. & Pull. 602.) It seems, however, now to be established, that such a difference does exist; and that, although debts upon ordinary contracts, (as, for instance, rents,) are not due till the last instant of the day; (*Duppa v. Mayo*, 1 Saund. 287; *Maund's case*, 7 Rep. 113; *Wood & Chiver's case*, 4 Leon. 180;) still,

These estates were originally granted to mere farmers or husbandmen, who every year rendered some equivalent in money, provisions, or other rent, to the lessors or landlords: but, in order to encourage them to manure and cultivate the ground, they had a permanent interest granted them, not determinable at the will of the lord. And yet their possession was esteemed of so little consequence, that they were rather considered as the bailiffs or servants of the lord, who were to *receive and account for the profits at a settled price, than as having any property of their own (5). And therefore they were not allowed to have a freehold estate; but their interest (such as it was) vested after their deaths in their executors, who were to make up the accounts of their testator with the lord, and his other creditors, and were entitled to the stock upon the farm. The lessee's estate might also, by the ancient law, be at any time defeated by a common recovery suffered by the tenant of the freehold (f); which annihilated all leases for years then subsisting, unless afterwards renewed by the recoveror, whose title was supposed superior to his by whom those leases were granted (6).

The grantees of these estates were formerly considered as mere bailiffs of the lord.

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While estates for years were thus precarious, it is no wonder that they were usually very short, like our modern leases upon rack rent; and indeed we are told (g) that by the ancient law no leases for more than forty years were allowable,

Being precarious, estates for years were usually short.

(f) Co. Litt. 46.

(g) Mirror. c. 2, s. 27; Co. Litt. 45, 46.

bills of exchange, more especially if made payable at banking or commercial houses, whose hours of business are fixed, must be paid within those hours; and if an acceptor declares at eleven o'clock in the morning that he will not pay, the holder is not bound to apply again at a later period of the day, but may immediately treat the bill as a dishonoured one. (*Ex parte Moline*, 19 Ves. 217; *S.C.* 1 Rose, 303; *Burbridge v. Manners*, 3 Campb. 194.)

(5) See Vol. III. p. 157.

(6) At this day, the same just rule prevails in every case of recovery by *bonâ fide* suit, where the title of the recoveror is prior to that of the tenant

for years; and the principle of the old doctrine went no further. (*Flower v. Rigden*, Cro. Eliz. 284; *Pledgard v. Lake*, Cro. Eliz. 718.)

From the slight consideration, originally attached to the interests of termors for years, that principle of law was very naturally deduced, which holds that the possession of the tenant is the possession of the reversioner.

Fictitious recoveries, as a mere mode of assurance, have been abolished since this note was first published, and a more simple mode of effecting the same end substituted, by the statute of 3 & 4 Gul. IV. c. 74.

because any longer possession (especially when given without any livery declaring the nature and duration of the estate) might tend to defeat the inheritance. Yet this law, if ever it existed, was soon antiquated; for we may observe in Madox's collection of ancient instruments, some leases for years of a pretty early date, which considerably exceed that period (*h*): and long terms, for three hundred years or a thousand, were certainly in use in the time of Edw. III. (*i*), and probably of Edward I. (*k*). But certainly, when by the statute 21 Hen. VIII. c. 15, the termor (that is, he who is entitled to the term of years) was protected against these fictitious recoveries, and his interest rendered secure and permanent, long terms began to be more frequent than before; and were afterwards extensively introduced, being found extremely convenient for family settlements and mortgages: continuing subject, however, to the same rules of succession, * and with the same inferiority to freeholds, as when they were little better than tenancies at the will of the landlord.

What constitutes an estate for years.

Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years (7). And therefore this estate is frequently called a term, *terminus*, because its duration or continuance is bounded, limited, and determined: for every such estate must have a certain beginning, and certain end (*l*). But *id certum est, quod certum reddi potest*: therefore, if a man make a lease to another, for so many years as J. S. shall name, it is a good lease for years (*m*); for though it is at present uncertain, yet when J. S. hath named the years, it is then reduced to a certainty. If no day of commencement is named in the creation of this estate, it begins from the making, or delivery, of the lease (*n*). A lease for so many years as J. S. shall live, is void from the beginning (*o*); for it is

(*h*) Madox Formulæ Anglicanæ. No. 239, fol. 140. Demise for eighty years, 21 Rich. II. Ibid. No. 245, fol. 146, for the like term. A. D. 1429. Ibid. No. 248, fol. 148, for fifty years, 7 Edw. IV.

(*i*) 32 Ass. pl. 6. Bro. Abr. t. Mor-

dauncestor, 42. Spoliation, 6.

(*k*) Stat. of Mortmain, 7 Edw. I.

(*l*) Co. Litt. 45.

(*m*) 6 Rep. 35.

(*n*) Co. Litt. 46.

(*o*) Ibid. 45.

(7) See *ante*, the note to p. 140.

neither certain, nor can ever be reduced to a certainty, during the continuance of the lease. And the same doctrine holds, if a parson make a lease of his glebe for so many years as he shall continue parson of Dale; for this is still more uncertain. But a lease for twenty or more years, if J. S. shall so long live, or if he should so long continue parson, is good (*p*): for there is a certain period fixed, beyond which it cannot last; though it may determine sooner, on the death of J. S., or his ceasing to be parson there.

We have before remarked, and endeavoured to assign the reason of, the inferiority in which the law places an estate for years, when compared with an estate for life, or an inheritance: observing, that an estate for life, even if it be *pur auter vie* (8), is a freehold; but that an estate for a thousand years is only a chattel (9), and reckoned part of the personal estate (*q*). Hence it follows, that a lease for years may be made to commence *in futuro*, though a lease for life cannot (10). As, if I grant lands to Titius to hold from Michaelmas next for *twenty years, this is good; but to hold from Michaelmas next for the term of his natural life, is void. For no estate of freehold can commence *in futuro*; because it cannot be created at common law without livery of seisin, or corporal possession of the land; and corporal possession cannot be given of an estate now, which is not to commence now, but hereafter (*r*). And, because no livery of seisin is

A lease for years may be made to commence *in futuro*; not so, a lease for life.

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(*p*) Co. Litt. 46.

(*q*) Ibid.

(*r*) 5 Rep. 94.

(8) See *ante*, p. 120, and *post*, pp. 258, *et seq.*

(9) See *post*, p. 386.

(10) For, a chattel interest for years concerns the occupation only; but a lease for life, if made by a common law conveyance, requires livery of seisin, provided the estate leased consist of a corporeal hereditament, of which the lessor has the possession as well as the seisin. Where the estate consists of incorporeal hereditaments, seisin, of course, cannot be given; and where the freehold interest is granted by bargain and sale, or other assurance taking effect by virtue of the statute

of uses, livery of seisin is not required; in such cases, a freehold interest may be effectually limited to commence *in futuro*; but the seisin will remain in the grantor, till it can vest according to the form of the limitation, so that it will never be in abeyance; therefore, there will always be an immediate tenant of the freehold, to answer any *præcipe* at the suit of strangers, and to render to the lord the returns of the feud; which considerations were the foundation of the rule of the common law, that a freehold cannot be created to commence *in futuro*. (Watk. on Convey., ch. 3, Prest. ed.)

necessary to a lease for years, such lessee is not said to be *seised*, or to have true legal seisin of the lands. Nor indeed does the bare lease vest any estate in the lessee; but only gives him a right of entry on the tenement, which right is called his *interest in the term*, or, *interesse termini*: but when he has actually so entered, and thereby accepted the grant, the estate is then, and not before, vested in him, and he is *possessed*, not properly of the land, but of the term of years (*s*); the possession or seisin of the *land* remaining still in him who hath the freehold. Thus the word, *term*, does not merely signify the time specified in the lease, but the estate also and interest that passes by that lease; and therefore the *term* may expire, during the continuance of the *time*; as by surrender, forfeiture, and the like. For which reason, if I grant a lease to A. for the term of three years, and after the expiration of the said *term* to B. for six years, and A. surrenders or forfeits his lease at the end of *one* year, B.'s interest shall immediately take effect: but if the remainder had been to B. from and after the expiration of the said *three years*, or from and after the expiration of the said *time*, in this case B.'s interest will not commence till the time is fully elapsed, whatever may become of A.'s term (*t*).

Tenant for years is entitled to the same estovers as tenant for life.

Tenant for term of years hath incident to and inseparable from his estate, unless by special agreement, the same estovers (11) which we formerly observed (*u*) that tenant for life was entitled to; that is to say, house-bote, fire-bote, plough-bote, and hay-bote (*w*); terms which have been already explained (*x*).

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Where a lease for years is certain, the tenant is not entitled to emblements; otherwise, where it depends upon an uncertainty.

* With regard to emblements (12), or the profits of lands sowed by tenant for years, there is this difference between him and tenant for life: that where the term of tenant for years depends upon a certainty, as if he holds from Midsummer for ten years, and in the last year he sows a crop of corn, and it is not ripe and cut before Midsummer, the end of his term, the landlord shall have it (13); for the tenant

(*s*) Co. Litt. 46.

(*t*) Ibid. 45.

(*u*) Page 122.

(*w*) Co. Litt. 45.

(*x*) Page 35.

(11) See *ante*, pp. 34 and 122, with the notes thereto.

(12) See *ante*, p. 122, note (7).

(13) Unless a custom prevails in

knew the expiration of his term, and therefore it was his own folly to sow what he never could reap the profits of (*y*). But where the lease for years depends upon an uncertainty: as, upon the death of the lessor, being himself only tenant for life, or being a husband seised in right of his wife; or if the term of years be determinable upon a life or lives; in all these cases the estate for years not being certainly to expire at a time foreknown, but merely by the act of God, the tenant, or his executors, shall have the emblements in the same manner that a tenant for life or his executors shall be entitled thereto (*z*). Not so, if it determine by the act of the party himself: as if tenant for years does any thing that amounts to a forfeiture: in which case the emblements shall go to the lessor and not to the lessee, who hath determined his estate by his own default (*a*) (14).

II. The second species of estates not freehold, are estates at *will*. An estate at will is where lands and tenements are let by one man to another, to have and to hold at the will of the lessor; and the tenant by force of this lease obtains possession (*b*). Such tenant hath no certain indefeasible estate, nothing that can be assigned by him to any other; because the lessor may determine his will, and put him out whenever he pleases. But every estate at will is at the will of both parties, landlord and tenant; so that either of them may determine his will, and quit his connexions with the other at his own pleasure (*c*) (15). Yet this must be un-

II. Estates at will—where lands, &c. are let to one, to hold at the will of the lessor.

(*y*) Litt. s. 68.

(*z*) Co. Litt. 56.

(*a*) Ibid. 55.

(*b*) Litt. s. 68.

(*c*) Co. Litt. 55.

the district where the land is situated, that the tenant shall be entitled to an outgoing crop.

(14) When a woman, who is entitled to tenancy *durante viduitate* only, sows corn, and marries before it is cut, she is clearly not entitled to the emblements, if the land be in her own occupation; but if she had let the land before her marriage, and her lessee had sown it, some doubt may exist whether he would, or would not, be allowed to enjoy the benefit of his industry and manurance. In the report

of *Oland's case*, by Lord Coke, (5 Rep. 116,) he says, "the lessee shall not have the emblements; for, although his estate is determined by the act of a stranger, yet he shall not be in a better condition than his lessor was." But, in the reports of what appears to be the same case, in *Goldsborough*, (p. 189,) and in *Cro. Eliz.* (p. 460,) a different doctrine is stated.

A parson who *resigns* his living is not entitled to emblements. (*Bulwer v. Bulwer*, 2 Barn. & Ald. 471.)

(15) Mr. Christian, in his note upon

derstood with some restriction. For, * if the tenant at will sows his land, and the landlord, before the corn is ripe, or before it is reaped, puts him out, yet the tenant shall have the emblements, and free ingress, egress, and regress, to cut and carry away the profits (*d*). And this for the same reason, upon which all the cases of emblements turn (16); *viz.*

(*d*) Co. Litt. 56.

this passage of the text, intimates, that all estates, which are said to be holden at will, are now properly construed to enure as tenancies from year to year: and he cites as his authority the case of *Clayton v. Blakey*. (8 T. R. 3.) But, in that case, the tenant had held the premises for several years; and we may collect from *Thunder v. Belcher*, (3 East, 451,) that, by payment of an annual rent, which had been received by the landlord, an implied tenancy from year to year had been raised, though the tenant was originally let in under an invalid lease. So, in *Doe v. Lees*, (2 W. Bla. 1173,) Chief Justice De Grey said, all leases for uncertain terms are *prima facie*, leases at will; it is the reservation of an annual rent that turns them into leases from year to year. And though there is an *obiter dictum* ascribed to Lord Mansfield, in the report of *Timmins v. Rowlison*, (3 Burr. 1609,) where his Lordship is represented to have said that, "leases at will, in the strict legal notion of a lease at will, exist only nominally," (the word in Burr. is *notionally*, but that is pretty certainly a mere misprint,) "and have been succeeded by another species of contract which is less inconvenient;" still, this incidental observation (though it has called forth no temperate vituperation from Mr. Watkins, in his *Elem. of Conv.* 14,) must, in fairness, be understood, not literally, but as meaning no more than what all the cases on the subject prove, namely, that our courts are disposed to construe estates to be terms from year to year, rather than to be estates

at will, as being, for general purposes, the most convenient construction, when the terms of the contract do not exclude it. But, in the case of *Richards v. Langridge*, (4 Taunt. 131,) Chief Justice Mansfield said, "you must find some act of Parliament, or some decision of the courts, that two persons cannot agree to make a tenancy at will. Have you any case where the courts have declared that there must be a tenancy from year to year, the parties having expressly agreed that the holding shall be as long as both parties please? If there were a general letting at a yearly rent, though payable half yearly, or quarterly, and though nothing were said about the duration of the term, it is an implied letting from year to year. But if two parties agree that the one should let, and the other shall hold, so long as both parties please, that is a holding at will, and there is nothing to hinder parties from making such an agreement." With this doctrine Heath and Chambre, J. J. agreed; and denied the proposition, that at this day there is no such thing as a tenancy at will. The case of *Timmins v. Rowlison* is alluded to in *Johnstone v. Huddleston*, (4 Barn. & Cress. 937; S. C. Dowl. & Ryl. 421;) with an intimation that it was not necessary to give the tenant any notice whatever to quit. Every lease at will is determinable at the pleasure of either party, though it be expressed in the grant to be at the will of one of them only. (*Carpenter v. Collins*, Moor, 775.)

(16) See *ante*, p. 122, note; and also the last note but one.

the point of uncertainty: since the tenant could not possibly know when his landlord would determine his will, and therefore could make no provision against it; and having sown the land, which is for the good of the public, upon a reasonable presumption, the law will not suffer him to be a loser by it. But it is otherwise, and upon reason equally good, where the tenant himself determines the will; for in this case the landlord shall have the profits of the land (e).

What act does, or does not, amount to a determination of the will on either side, has formerly been matter of great debate in our courts. But it is now, I think, settled, that (besides the express determination of the lessor's will, by declaring that the lessee shall hold no longer: which must either be made upon the land (f), or notice must be given to the lessee) (g) the exertion of any act of ownership by the lessor, as entering upon the premises and cutting timber (h), taking a distress for rent and impounding it thereon (i), or making a feoffment, or lease for years of the land to commence immediately (h); any act of desertion by the lessee, as assigning his estate to another, or committing waste, which is an act inconsistent with such a tenure (l); or, which is *instar omnium*, the death or outlawry of either lessor or lessee (m); puts an end to or determines the estate at will.

The law is, however, careful, that no sudden determination of the will by one party shall tend to the manifest and unforeseen prejudice of the other. This appears in the case of *emblems before mentioned; and, by a parity of reason, the lessee, after the determination of the lessor's will, shall have reasonable ingress and egress to fetch away his goods and utensils (n). And, if rent be payable quarterly or half-yearly, and the lessee determines the will, the rent shall be paid to the end of the current quarter or half-year (o). And, upon the same principle, courts of law have of late years leaned as much as possible against construing demises, where no certain term is mentioned, to be tenancies at will; but have rather held them to be tenancies from

As to what determines the will.

Where rent is reserved, it is generally construed to be a tenancy from year to year.

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(e) Co. Litt. 55.

(f) Ibid.

(g) 1 Ventr. 248.

(h) Co. Litt. 55.

(i) Ibid. 57.

(k) 1 Roll. Abr. 860; 2 Lev. 88.

(l) Co. Litt. 55.

(m) 5 Rep. 116; Co. Litt. 57, 62.

(n) Litt. s. 69.

(o) Salk. 414; 1 Sid. 339.

year to year so long as both parties please, especially where an annual rent is reserved : in which case they will not suffer either party to determine the tenancy even at the end of the year, without reasonable notice to the other, which is generally understood to be six months (*p*) (17) (18).

(*p*) This kind of lease was in use as long ago as the reign of Henry VIII., when half a year's notice seems to

have been required to determine it. (T. 13 Hen. VIII. 15, 16.)

(17) See *ante*, the note to p. 141.

(18) Mr. Christian observes, " the learned judge, in the text, tells us, the notice must be *six months*, and in the note *half a year*; but it is *demy an*, or half a year, in the 13 Hen. VIII. 15. The notice must be to quit at the end of the year. 1 T. R. 159. The time specified in the notice will be presumed to be the end of the year, unless the contrary is shown. *Ib.* If the notice is not good for one year, it is not good for the next, it being supposed that the landlord has waived it. 2 Bro. 161. The defect of notice cannot be set up by a tenant who controverts the title of the landlord. *Ib.*

" Where part of the premises was entered upon at Candlemas, and part at May-day, but the rent was payable at Lady-day, it was held that a notice to quit half a year before Lady-day was sufficient for the whole. 2 Bl. Rep. 1224.

" Though the tenant does not object to the insufficiency of the notice at the time, he is not precluded from taking advantage of it afterwards at the trial. 4 T. R. 361.

" A delivery of the notice to the tenant's maid-servant at his house, though not upon the premises, the contents of which were explained to her, was held a sufficient service of the notice, as the jury might presume that she gave it afterwards to her master. 4 T. R. 464.

" A mistake in the notice, in writing 1795 for 1796, as the later date clearly appeared to be the intention of the

parties, from the conversation which passed upon delivering the notice, was held not to invalidate it. 7 T. R. 64.

" It is now determined, that if a landlord gives notice to quit, and afterwards receives rent for the time subsequent to the end of the year, it is a waiver of the notice, it being a clear acknowledgment and affirmance of the tenancy. 6 T. R. 219. And a distress for such rent will not admit of any other explanation, and is also an unequivocal waiver of the notice. H. Bl. Rep. 311.

" Where a parol lease is void, with respect to the duration of the term, by the statute of frauds, yet the tenant holds from year to year, according to the time he was to quit, agreed upon by that parol lease. 5 T. R. 471.

" It is not necessary to give notice to produce the original notice to quit, but a copy of it is evidence. Mr. Justice Wilson, at York, held it was necessary, but having consulted the rest of the judges, they were of opinion it was not necessary; and in the following year, in another cause at York, he decided agreeably to that opinion.

" Mr. Justice Chambre, at Carlisle, 1802, after debate and consideration, held the same respecting a notice not to come upon the plaintiff's grounds to kill game, and certified that it was a wilful trespass.

" So a copy of an attorney's bill, delivered to the defendant, may be read in evidence without proof of notice to produce the original; the nature of the action in these cases being equi-

There is one species of estates at will that deserves a more particular regard than any other; and that is, an estate held by copy of court-roll; or, as we usually call it, a *copyhold* estate (19). This, as was before observed (*q*), was in its original and foundation nothing better than a mere estate at will. But the kindness and indulgence of successive lords of manors having permitted these estates to be enjoyed by the tenants and their heirs, according to particular customs established in their respective districts; therefore, though they still are held at the will of the lord, and so are in general expressed in the court rolls to be, yet that will is qualified, restrained, and limited, to be exerted according to the custom of the manor. This custom being suffered to grow up by the lord, is looked upon as the evidence and interpreter of his will: his will is no longer arbitrary and precarious; but fixed and ascertained by the custom to be the same, and no other, that has time out of mind been exercised and declared by his ancestors. A copyhold tenant is therefore now full as properly a tenant by the custom, as a tenant at will; the custom *having arisen from a series [* 148] of uniform wills. And therefore it is rightly observed by Calthorpe (*r*), that “copyholders and customary tenants differ not so much in nature as in name; for although some “be called copyholders, some customary, some tenants by “the virge, some base tenants, some bond tenants, and some “by one name and some by another, yet do they all agree “in substance and kind of tenure: all the said lands are “holden in one general kind, that is, by custom and continuance of time; and the diversity of their names doth not “alter the nature of their tenure.”

(*q*) Page 93.

(*r*) On copyholds, 51, 54.

valent to such notice. 2 Bos. & Pul. 237.

“It does not seem necessary that a notice to quit a tenancy from year to year, or not to come upon another’s ground to pursue game, should be in writing; but perhaps it is most convenient to deliver a written notice by a witness who preserves a copy of it.

“The following notice to a tenant from year to year to quit, was ap-

proved by Lord Kenyon:—‘To quit
‘at Lady-day, or at the end of the year
‘when your tenancy expires, and if
‘there is not six months between the
‘time of the delivery of this notice
‘and the end of this present year, then
‘you will quit at the end of the ensuing year.’”—CH.

(19) See *ante*, the 3d sect. of chapter 6, (pp. 90—98,) with the notes thereto.

Of the nature of the interest of a copyhold tenure at will.

Almost every copyhold tenant being therefore thus tenant at the will of the lord according to the custom of the manor ; which customs differ as much as the humour and temper of the respective ancient lords, (from whence we may account for their great variety,) such tenant, I say, may have, so far as the custom warrants, any other of the estates or quantities of interest, which we have hitherto considered, or may hereafter consider, and hold them united with this customary estate at will. A copyholder may, in many manors, be tenant in fee-simple, in fee-tail, for life, by the curtesy, in dower, for years, at sufferance, or on condition : subject, however, to be deprived of these estates upon the concurrence of those circumstances which the will of the lord, promulged by immemorial custom, has declared to be a forfeiture or absolute determination of those interests ; as in some manors the want of issue male, in others the cutting down timber, the non-payment of a fine, and the like. Yet none of these interests amount to freehold ; for the freehold of the whole manor abides always in the lord only (*s*), who hath granted out the use and occupation, but not the corporal seisin or true legal possession, of certain parcels thereof to these his customary tenants at will.

The freehold of the manor is still in the lord.

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The reason of originally granting out this complicated kind of interest, so that the same man shall, with regard to the same land, be at one and the same time tenant in fee-simple, and also tenant at the lord's will, seems to have arisen from the nature of villenage tenure ; in which a grant of any estate of freehold, or even for years absolutely, was an immediate enfranchisement of the villein (*t*). The lords, therefore, though they were willing to enlarge the interest of their villeins, by granting them estates which might endure for their lives, or sometimes be descendible to their issue, yet not caring to manumit them entirely, might probably scruple to grant them any absolute freehold ; and for that reason it seems to have been contrived, that a power of resumption at the will of the lord should be annexed to these grants, whereby the tenants were still kept in a state of villenage, and no freehold at all was conveyed to them in their respective lands : and of course, as the freehold of all lands must necessarily rest and abide somewhere, the law

(*s*) Litt. s. 81 ; 2 Inst. 325.

(*t*) Mirr. c. 2, s. 28 ; Litt. s. 204, 5, 6.

supposed it still to continue and remain in the lord. Afterwards, when these villeins became modern copyholders, and had acquired by custom a sure and indefeasible estate in their lands, on performing their usual services, but yet continued to be stiled in their admissions tenants at the will of the lord—the law still supposed it an absurdity to allow, that such as were thus nominally tenants at will could have any freehold interest; and therefore continued, and now continues to determine, that the freehold of lands so holden abides in the lord of the manor, and not in the tenant; for though he *really* holds to him and his heirs for ever, yet he is also *said* to hold at another's will. But with regard to certain other copyholders, of free or privileged tenure (20), which are derived from the ancient tenants in villein-socage, and are not said to hold *at the will of the lord*, but only *according to the custom of the manor*, there is no such absurdity in allowing them to be capable of enjoying a freehold interest: and therefore the law doth not suppose the freehold of such lands to rest in the lord of whom they are holden, but in the tenants themselves (*u*); who are sometimes called *customary freeholders*, being allowed to have a freehold *interest*, though not a freehold *tenure*.

* However, in common cases, copyhold estates are still ranked (for the reasons above-mentioned) among tenancies at will; though custom, which is the life of the common law, has established a permanent property in the copyholders, who were formerly nothing better than bondmen, equal to that of the lord himself, in the tenements holden of the manor; nay, sometimes even superior; for we may now look upon a copyholder of inheritance, with a fine certain, to be little inferior to an absolute freeholder in point of interest, and in other respects, particularly in the clearness and security of his title, to be frequently in a better situation.

III. An estate at *sufferance*, is, where one comes into possession of land by lawful title, but keeps it afterwards with-

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III. Estate by sufferance is where one in

(*u*) Fitz. Abr. tit. Corone, 310; Cro. Car. 229; 1 Roll. Abr. 562; Custom, 12; Bro. Abr. tit. Custom, 2 Ventr. 143; Carth. 432; Lord 2, 17; Tenant per copie, 22; 9 Rep. Raym. 1225. 76; Co. Litt. 59; Co. Copyh. s. 32;

(20) See *ante*, the 4th sect. of chapter 6, (pp. 98—101,) with the notes thereto.

possession of
land lawfully
(as by lease),
holds after the
expiration of his
term without
title.

out any title at all. As, if a man takes a lease for a year, and, after the year is expired, continues to hold the premises without any fresh leave from the owner of the estate. Or, if a man maketh a lease at will and dies, the estate at will is thereby determined : but if the tenant continueth possession, he is tenant at sufferance (*v*) (21). But, no man can be tenant at sufferance against the king, to whom no *laches*, or neglect, in not entering and ousting the tenant is ever imputed by law ; but his tenant, so holding over, is considered as an absolute intruder (*w*) (22). But, in the case of a subject, this estate may be destroyed whenever the true owner shall make an actual entry on the lands and oust the tenant : for, before entry, he cannot maintain an action of trespass

(*v*) Co. Litt. 57.

(*w*) Ibid.

(21) Lord Coke tells us (in 2d Instit. 134) this diversity is to be observed, that where a man cometh to a particular estate by the act of the party, there if he hold over, he is a tenant at sufferance ; but where he cometh to the particular estate by act of law, as a guardian for instance, there, if he hold over, he is no tenant at sufferance, but an abator. The same doctrine is laid down in 1 Instit. 271.

Formerly, tenants at sufferance were not liable to pay any rent for the lands, because it was the folly of the owners to suffer them to continue in possession, after the determination of their rightful estate. (*Finch's case*, 2 Leon. 143.) But by the statute of 4 Geo. II. c. 28, cited by our author in the next page, it is enacted, that when any tenant holds over, after demand made, and notice in writing to deliver up the possession, he shall pay double the yearly value of the lands so detained, for so long time as the same are detained ; against the recovery of which penalty there shall be no relief in equity. Where a demise is for a time certain, no notice to quit is necessary, in order to put an end to the tenancy, though a demand of possession, and notice in writing, are necessary, to entitle the landlord to double rent or value.

Such demand may be made for that purpose, several weeks after the expiration of the term, if the landlord have done no act in the mean time to acknowledge the continuation of the tenancy, and he may recover the double value, from the time of such demand. (*Cobb v. Stokes*, 8 East, 361.) And a further remedy is given to landlords by the statute of 1 Geo. IV. c. 87, enabling them more speedily to recover possession of lands and tenements unlawfully held over by tenants. But this statute only applies to cases where the term or interest of a tenant holding under a lease, or agreement in writing, for any term or number of years *certain*, or from year to year, has expired or been regularly determined. It was held, therefore, in the case of *Doe on dem. of Pemberton v. Roe*, (7 Barn. & Cress. 2,) that a tenancy for years determinable on lives is not within the act.

(22) As *laches* is never imputed to the crown, a lessee of the crown lands will never be considered tenant by sufferance, but the law will account him to be a bailiff of his own wrong, and so to be accountable to the crown, but no intruder, till office be found. (*Sir Moyle Finch's case*, 2 Leon. 143.)

against the tenant by sufferance, as he might against a stranger (*x*): and the reason is, because the tenant being once in by a lawful title, the law (which presumes no wrong in any man) will suppose him to continue upon a title equally lawful; unless the owner of the land by some public and avowed act, such as entry is, will declare his continuance to be tortious, or, in common language, wrongful.

* Thus stands the law, with regard to tenants by sufferance: and landlords are obliged in these cases to make formal entries upon their lands (*y*), and recover possession by the legal process of ejectment; and at the utmost, by the common law, the tenant was bound to account for the profits of the land so by him detained. But now, by statute 4 Geo. II. c. 28, in case any tenant for life or years, or other person claiming under or by collusion with such tenant, shall wilfully hold over after the determination of the term, and demand made and notice in writing given by him to whom the remainder or reversion of the premises shall belong, for delivering the possession thereof; such person, so holding over or keeping the other out of possession, shall pay for the time he detains the lands, at the rate of double their yearly *value*. And, by statute 11 Geo. II. c. 19, in case any tenant, having power to determine his lease, shall give notice of his intention to quit the premises, and shall not deliver up the possession at the time contained in such notice, he shall thenceforth pay double the former *rent*, for such time as he continues in possession. These statutes have almost put an end to the practice of tenancy by sufferance, unless with the tacit consent of the owner of the tenement (23).

Of the landlord's remedies for the recovery of possession.

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(*x*) Co, Litt. 57.

(*y*) 5 Mod. 384.

(23) Mr. Christian observes, that "the double value may be recovered though it is not mentioned in the notice to quit. (1 T. R. 53.) The notice by the landlord must be in writing; but that by the tenant, under 11 Geo. II. c. 19, may be parol. (3 Bur. 1603.) The double value can only be recovered by action of debt; but the double rent may be recovered by distress or otherwise, like single rent. (1 Bl. 535.) No length of time is necessary to the

validity of these notices under the statutes, to entitle the landlord to double value.

"If the tenant hold over after the expiration of his term, or after the end of the year, when he has had a proper notice to quit, the landlord may turn his cattle upon the premises, but without force, and the cattle cannot be distrained as damage feasant, by the tenant. (7 T. R. 431.)"

CHAPTER X.

OF ESTATES UPON CONDITION.

Of estates upon condition.

BESIDES the several divisions of estates, in point of interest, which we have considered in the three preceding chapters, there is also another species still remaining, which is called an estate *upon condition* (1); being such whose existence depends upon the happening or not happening of some un-

(1) As to things executed, (a conveyance of lands, for instance,) a condition to be valid, must be created and annexed to the estate at the time that it is made, not subsequently; the condition may, indeed, be contained in a separate instrument, but then, that must be sealed and delivered at the same time with the principal deed. (Co. Litt. 236 b; Touch. 126.) As to things executory, (such as rents, annuities, &c.,) a grant of them may be restrained by a condition created after the execution of such grant. (Co. Litt. 237 a.) Littleton (in his 328th and three following sections) says, divers words there be, which, by virtue of themselves, make estates upon condition. Not only the express words, "upon condition," but also the words "provided always," or "so that," will make a feoffment, or deed, conditional. And again (in his 331st section) he says, the words "if it happen" will make a condition in a deed, provided a *power of entry* is added. Without the reservation of such a power, the words "if it happen" will not alone, and by their own force, make a good

condition. This distinction is also noticed in Sheph. Touch. 122, where it is also laid down, that although the words "proviso," "so that," and "on condition," are the most proper words to make a condition; yet they have not always that effect, but frequently serve for other purposes; sometimes they operate as a qualification or limitation, sometimes as a covenant. And when inserted *among the covenants* in a deed, they operate as a *condition*, only when attended with the following circumstances: 1st. When the clause wherein they are found is a substantive one, having no dependence upon any other sentence in the deed, or rather, perhaps, not being used merely in qualification of such other sentence, but standing by itself. 2nd. When it is compulsory upon the feoffee, donee, or lessee. 3rd. When it proceeds from the part of the feoffor, donor, or lessor, and declares *his* intention (but as to this point, see *Whichcote v. Fox*, Cro. Jac. 398; *Cromwell's case*, 2 Rep. 72, and *infra*). 4th. When it is applied to the estate, or other subject matter.

The word "provided" may operate

certain event, whereby the estate may be either originally created, or enlarged (2), or finally defeated (a) (3). And

(a) Co. Litt. 201.

as a condition and also a covenant: thus, if the words are, "provided always, and the feoffee doth covenant" that neither he nor his heirs shall do such an act; this, if by indenture, is both a condition and a covenant, for the words will be considered as the words of *both* parties. (*Whichcote v. Fox*, Cro. Jac. 398.) But if the clause have dependence on another clause in the deed, or be the words of the feoffee to compel the *feoffor* to do something; then it is not a condition, but a covenant only. So, if the clause be applied to some other thing, and not to the substance of the thing granted, then it is no condition. As, if a lease be made of land, rendering rent at B., provided that if such a thing happen it shall be paid at C., this does not make the estate conditional. And a proviso that a lessor shall not distrain for rent, may be a good condition to bind him; but not a condition annexed to the estate. (See Co. Litt. 233 b; *Englefield's case*, Moor, 307; S. C. 7 Rep. 78; *Berkeley v. The Earl of Pembroke*, Moor, 707; S. C. Cro. Eliz. 306, 560; *Browning v. Beeston*, Plowd. 131.)

The word "if" frequently creates a condition, but not always; for sometimes it makes a *limitation*; as where a lease is made for years, if A. B. shall so long live. Conditions may be annexed to demises for years, without any of these formal words, where the intent that the estate should be conditional is apparent. (Co. Litt. 204 a, 214 b; Sheph. Touch. 123.)

(2) A particular estate may be limited, with a condition, that, after the happening of a certain event, the person to whom the first estate is limited shall have a larger estate. Such a condition may be good and effectual,

as well in relation to things which lie in grant, as to things which lie in livery, and may be annexed as well to an estate-tail, which cannot be drowned, as to an estate for life or years, which may be merged by the access of a greater estate. But, such increase of an estate by force of such a condition, ought to have four incidents. 1. There must be a particular estate as a foundation for the increase to take effect upon; which particular estate, Lord Coke held, must not be an estate at will, nor revocable, nor contingent. 2. Such particular estate ought to continue in the lessee or grantee, until the increase happens, or at least no alteration in privity of estate must be made by alienation of the lessee or grantee; though the alienation of the lessor or grantor will not affect the condition; and the alteration of persons by descent of the reversion to the heirs of the grantor, or his alienee, or of the particular estate to the representatives of the grantee, will not avoid the condition. Neither need such increase take place immediately upon the particular estate, but may enure as a remainder to the donee of the particular estate, or his representatives, subsequent to an intermediate remainder to somebody else. 3. The increase must vest and take effect immediately upon the performance of the condition; for, if an estate cannot be enlarged at the very instant appointed for its enlargement, the enlargement shall never take place. 4. The particular estate and the increase ought to derive their effect from one and the same instrument, or from several deeds delivered at one and the same time. (*Lord Stafford's case*, 8 Rep. 149—153.)

(3) It is a rule of law, that a condition, the effect of which is to defeat

these conditional estates I have chosen to reserve till last, because they are indeed more properly qualifications of other estates, than a distinct species of themselves; seeing that any quantity of interest, a fee, a freehold, or a term of years, may depend upon these provisional restrictions. Estates, then, upon condition, thus understood, are of two sorts: 1. Estates upon condition *implied*: 2. Estates upon condition *expressed*: under which last may be included, 3. Estates held *in vadio, gage, or pledge*: 4. Estates by *statute merchant, or statute staple*: 5. Estates held by *elegit*.

I. Estates upon condition *implied* in law, are where the grant has (though unexpressed) a condition annexed to it, from its nature.

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I. Estates upon condition implied in law, are where a grant of an estate has a condition annexed to it inseparably from its essence and constitution, although no condition be expressed in words. As if a grant be made to a man of an office, generally, without adding other words; the law tacitly annexes hereto a secret condition, that the grantee shall duly execute his office (*b*) (4), on breach of which condition *it is lawful for the grantor, or his heirs, to oust him, and grant it to another person (*c*). For an office, either public or private, may be forfeited by *mis-user* or *non-user*, both of which are breaches of this implied condition. 1. By *mis-user*, or abuse; as if a judge takes a bribe, or a park-keeper kills deer without authority. 2. By *non-user*, or neglect; which in public offices, that concern the administration of justice, or the commonwealth, is of itself a direct and immediate cause of forfeiture; but non-user of a private office is no cause of forfeiture, unless some special damage is proved to be occasioned thereby (*d*). For in the one case delay must necessarily be occasioned in the affairs of the public, which require a constant attention: but private offices not requiring so regular and unremitted a service, the temporary neglect of them is not necessarily productive of mischief: upon which account some special loss must be

(*b*) Litt. s. 378.

(*c*) Ibid. s. 379.

(*d*) Co. Litt. 233.

or determine an estate to which it is annexed, must defeat the whole of such estate; not determine it in part only, leaving it good for the residue. (*Jermin v. Arscot*, stated by Chief Justice

Anderson, in *Corbet's case*, 1 Rep. 85 b, and see Ibid. 86 b; *Chudleigh's case*, 1 Rep. 138 b.)

(4) *Bartlett v. Downes*, 3 Barn. & Cress. 619; *S. C.* 5 Dowl. & Ryl. 529.

proved, in order to vacate these. Franchises also, being regal privileges in the hands of a subject, are held to be granted on the same condition of making a proper use of them; and therefore they may be lost and forfeited, like offices, either by abuse or by neglect (*e*).

Upon the same principle proceed all the forfeitures which are given by law of life estates and others; for any acts done by the tenant himself, that are incompatible with the estate which he holds. As if tenants for life or years enfeoff a stranger in fee-simple: this is, by the common law, a forfeiture of their several estates; being a breach of the condition which the law annexes thereto, *viz.* that they shall not attempt to create a greater estate than they themselves are entitled to (*f*). So, if any tenants for years, for life, or in fee, commit a felony (5); the king or other lord of the fee is entitled to have their tenements, because their estate is determined by the breach of the condition, "that they shall not commit felony," which the law tacitly annexes to every feodal donation.

*II. An estate on condition expressed in the grant itself, [* 154] is where an estate is granted, either in fee-simple or otherwise, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition (*g*). These conditions are therefore either *precedent*, or *subsequent* (6). Precedent are such as must happen

II. Estates upon condition *expressed* are where there is an express qualification annexed to the grant.

(*e*) 9 Rep. 50.

(*f*) Co. Litt. 215.

(*g*) Ibid. 201.

(5) See *ante*, the note to p. 72.

(6) Even at common law, and in the construction of a deed, no precise technical words necessarily make a stipulation *precedent* or *subsequent*: neither does it depend upon the circumstance whether the clause has a prior or a posterior place in the deed, so that it takes effect as a proviso. For, the same words have been construed to operate either as a precedent or as a subsequent condition, according to the nature of the transaction. (*Hotham v. The East India Company*, 1 T. R. 645; *Acherley v. Vernon*, Willes, 156.) The dependence, or independence, of

covenants or conditions, Lord Mansfield said, is to be collected from the evident sense and meaning of the parties; and however transposed they may be in a deed, their precedency must depend upon the order of time in which the intent of the transaction requires their performance. (*Jones v. Barkley*, 2 Dougl. 691.)

Such being the rule of common law, *a fortiori*, in courts of equity, and in the construction of wills, no technical words are held to distinguish precedent and subsequent conditions: the same words may, indifferently, constitute either; according to the intention of

or be performed before the estate can vest or be enlarged : subsequent are such, by the failure or non-performance of

the person who creates the condition. (*Robinson v. Comyns*, Ca. temp. Talb. 165 ; *Murray v. Jones*, 2 Ves. & Bea. 320.) Where a legacy is given, to which a condition *subsequent*, in restraint of marriage, is annexed, the condition is void and merely *in terrorem* ; (*Reynish v. Martin*, 3 Atk. 332 ; *Hicks v. Pendarvis*, 2 Freem. 41 ;) unless there be also a valid devise over of the particular legacy ; or, at least, it should seem, unless the will contain an *express* direction that such legacy, if the condition annexed thereto be not complied with, shall sink into the residue of the testator's property. (*Wheeler v. Bingham*, 3 Atk. 368 ; *Lloyd v. Branton*, 7 Meriv. 118 ; *Malcolm v. O'Callaghan*, 2 Mad. 350.) A mere general residuary bequest is not tantamount to a devise over of a legacy given on condition, but leaves such conditional legacy *in statu quo*, and can have no other effect but that of preventing what proves not to be otherwise well disposed of from falling, by order of law, to the next of kin. (*Scott v. Tyler*, 2 Dick. 723.)

Whether a condition *precedent*, in restraint of marriage, annexed to personal legacies, can be considered as *in terrorem* only, where there is no express limitation over, is a point upon which great diversity of judicial opinion has been declared : where there is a valid devise over, there can now be no doubt it will take effect, if the condition be not complied with : (*Clarke v. Parker*, 19 Ves. 14 :) and even where there is not an express devise over, the preponderance of authority seems to establish, that, even as to personal bequests, if the condition is confined within reasonable limits as to time ; (*Scott v. Tyler*, 2 Dick. 723 ; *Graydon v. Hicks*, 2 Atk. 16 ;) and does not go in entire restraint of marriage ; as also where it is framed only

to guard against a connexion with a particular individual, or family, which the testator deems objectionable ; (*Jarvis v. Duke*, 1 Vern. 19 ;) in all such cases, the condition must be complied with, or the legacy (though not given over) can never vest ; or at least not be payable : (*Elton v. Eason*, 1 Ves. sen. 6 ; *Knight v. Cameron*, 14 Ves. 392 :) for, such cases necessarily exclude the only grounds which can authorise courts of equity to dispense with a strict performance of conditions precedent : (*Hollinrake v. Lister*, 1 Russ. 508 :) but conditions which would, virtually, go almost to the total exclusion of marriage, are void. (1 Eq. Ca. Ab. 108, in margin ; *Keily v. Monck*, 3 Ridg. P. C. 263.) Where legacies are charged upon land, or the gift at all savours of the realty, and is coupled with a condition, that condition must be performed, and the trusts carried into execution in equity with analogy to the common law. (*Scott v. Tyler*, 2 Dick. 719 ; *Long v. Ricketts*, 2 Sim. & Stu. 183.) Lord Hardwicke held no rule to be better settled than the one which declares that portions charged on lands do not vest till the time of payment comes ; and if that time, according to the will, be not until a marriage with consent, (his Lordship said,) there is no rule, in law or equity, which can excuse the want of such consent. In the same judgment it was also intimated, that it was unimportant whether there was or was not a devise over ; for, the portions there in question, *being to arise out of lands*, had nothing testamentary in them, so as to be subject to the jurisdiction of the ecclesiastical courts, or the rules of the civil law : (*Harvey v. Aston*, 1 Atk. 378, 379 ; *S. C.* Willes, 91 :) whether it was wise to adopt those rules at all, may perhaps be questionable ; (*Pearce*

which an estate already vested may be defeated. Thus, if an estate for life be limited to A. upon his marriage with B.,

v. *Loman*, 3 Ves. 139;) but it has long been well established in point of practice, that a material difference is made, as to portions out of lands and merely personal legacies; and that courts of equity, for uniformity of decision *in pari materia*, follow the ecclesiastical courts in the one case, and the common law in the other. (*Reynish v. Martin*, 3 Atk. 333; *Pullen v. Ready*, 2 Atk. 590; *Sheriff v. Mortlock*, W. Kelynge, 24; Co. Litt. 206.)

It must be obvious, that the rules applied to conditional bequests charged upon real estate, will bear upon conditional devises of the lands themselves. In *Long v. Ricketts*, (2 Sim. & Stu. 179,) which was the case of a devise of real estates to trustees, in trust to pay the rents and profits to the testator's son, so long as he should continue unmarried, and to convey the estates to him in case of his marriage with the consent of the trustees; but in case he should marry against their consent, then to sell the estates and divide the proceeds amongst other persons:—the son having married without the knowledge of the trustees, who disapproved the marriage when they heard of it; it was held, that, the marriage having been had *without* the consent of the trustees, though not *against* their consent, the devise over took effect. But, where a person devised his estate to trustees, to the use of his son for life, with remainders over, and with a proviso, that if the son should marry any woman not having a competent portion, or, without the consent of the trustees first had, then his trustees should stand seized of the premises to the use of the testator's two daughters; and he declared that the said proviso or condition was not intended by him, or to be construed or taken to be *in terro-*

rem; but a condition in want of performance whereof in every respect the estate should in no case be vested in his son; it was determined that, as the son had married a woman with a competent portion, though without the consent or approbation of the trustees, he had sufficiently satisfied the condition, by the performance of one of the prescribed alternatives; for that, conditions in restraint of marriage were not to be favoured, but ought to be construed with the utmost rigour and strictness to dispense with forfeitures. (*Long v. Dennis*, 4 Burr. 2054; *O'Callaghan v. Cooper*, 5 Ves. 125. See, however, *Clarke v. Parker*, 19 Ves. 19, where it is intimated that it is matter of doubtful propriety to make words bend to construction, in order to get rid of a forfeiture.)

Equity will not allow any one to take advantage of a bequest over, who has himself been instrumental in causing the breach of a condition. (*Garrett v. Pretty*, stated from Reg. Lib. in 3 Meriv. 120; *Clarke v. Parker*, 19 Ves. 12; *D'Aguilar v. Drinkwater*, 2 Ves. & Bea. 225.) But, it is a general rule, that where a condition is annexed by will to a devise or bequest, and no one is bound to give notice of such condition, the parties must themselves take notice, and perform the condition, in order to avoid a forfeiture. (*Chauncy v. Graydon*, 2 Atk. 619; *Fry v. Porter*, 1 Mod. 314; *Burgess v. Robinson*, 3 Meriv. 9; *Phillips v. Bury*, Show. P. C. 50.) Infancy will be no excuse, in such case, for non-performance of the condition. (*Bertie v. Lord Falkland*, 2 Freem. 221; *Lady Ann Fry's case*, 1 Ventr. 200.) The application of this general rule, however, is subject to one restriction:—where a condition is annexed to a devise of real estate to

the marriage is a precedent condition, and till that happens, no estate (*h*) is vested in A. Or, if a man grant to his lessee for years, that upon payment of a hundred marks within the term he shall have the fee, this also is a condition precedent, and the fee-simple passeth not till the hundred marks be paid (*i*). But, if a man grant an estate in fee-simple, reserving to himself and his heirs a certain rent; and that if such rent be not paid at the times limited, it shall be lawful for him and his heirs to re-enter, and avoid the estate: in this case the grantee and his heirs have an estate upon condition subsequent, which is defeasible if the condition be not strictly performed (*k*). To this class may also be referred all base fees, and fee-simples conditional at the common law (*l*) (7). Thus an estate to a man and his heirs, *tenants of the manor of Dale*, is an estate on condition that he and his heirs continue tenants of that manor. And so, if a personal annuity be granted at this day to a man and the heirs of his body, as this is no tenement within the statute of Westminster the second, it remains, as at common law, a fee-simple on condition that the grantee has heirs of his body. Upon the same principle depend all the determinable estates of freehold, which we mentioned in the eighth chapter: as *durante viduitate*, &c.: these are estates upon condition that the grantees do not marry (8), and

[* 155] the like. And, on the breach of any of these *subsequent conditions, by the failure of these contingencies; by the grantee's not continuing tenant of the manor of Dale, by not having heirs of his body, or by not continuing sole; the estates which were respectively vested in each grantee are wholly determined and void.

Distinction between a condition in a deed and a limitation.

A distinction is however made between a *condition in deed*

(*h*) Show. Parl. Cas. 83, &c.

(*k*) Litt. s. 325.

(*i*) Co. Litt. 217.

(*l*) See pages 109, 110, 111.

the testator's heir at law, there notice of the condition is necessary before he can incur a forfeiture; for, an heir at law will be supposed to have entered and made claim by descent, not under the will. (*Burleton v. Homfray*, Ambl. 259.)

It may be right to observe, that se-

veral parts of this note are extracted from Hovenden's notes to Vesey, junr's. Reports.

(7) See *ante*, section 2 to chapter 7, (pp. 109—112,) with the notes thereto.

(8) See *ante*, the last note but one.

and a *limitation* (9), which Littleton (*m*) denominates also a *condition in law*. For when an estate is so expressly con-

(*m*) Sect. 380 ; 1 Inst. 234.

(9) A condition, properly so called, annexed to an estate, differs from what is called a conditional limitation in this respect, that it is the proper effect of a condition, if it be broken, to give title to the grantor, or those claiming from him the reversion of the lands : but a conditional limitation limits the estate over to a stranger, and of itself causes the determination of the preceding particular estate, without any act, such as entry or claim, to be done or made by him who has the next expectant interest : whereas, in the case of an estate upon condition, properly so called, advantage must be taken of the breach thereof, by the activity of the grantor, his heirs or assigns. (Wooddeson, 24th Vin. Lect.)

A conditional limitation partakes of the nature both of a condition and of a remainder. It is to be observed, that it was formerly held, whenever the whole fee, or even freehold, was first limited, no condition or other quality could be annexed to this prior estate to defeat it, so as to pass the estate to a stranger. For, as a *remainder* it was void, being in abridgment or defeazance of the estate first limited : and as a *condition* it was void, since no one (it was held) but the donor or his heirs could take advantage of a condition broken, and an entry by them unavoidably defeated the livery upon which the remainder to the stranger depended. On these principles, it was impossible by the old law to limit (by deed, at all events, whether it could be done by will or not,) an estate to a stranger upon any event which went to abridge or determine an estate previously limited. But, the convenience of such limitations has established them ; and under the doctrine of uses, and of executory trusts, such limita-

tions are now permitted to take effect.

They partake of the nature of conditions, inasmuch as they defeat the estates previously limited ; and they are so far limitations, as upon the contingency taking place the estate passes to a stranger. (Hargr. note 1 to Co. Litt. 203 b.) Conditional limitations in many respects resemble contingent remainders ; and Mr. Douglas, (in his note to *Goodtitle v. Billington*, 2 Dougl. 755,) even intimates that the distinction between the two interests is merely verbal. But this is strenuously denied, and indeed conclusively disproved, by Mr. Fearne, (in his learned essay on Contingent Remainders, chap. 1, sect. 3, chap. 2, sect. 6,) and by Mr. Butler (in his notes on the passages just cited). From them we learn, that the substantial distinction between conditional limitations and contingent remainders is this : the effect of a conditional limitation always is to abridge or defeat a preceding estate ; but it is essential to an estate in remainder, that it should wait the regular expiration of the particular estate. The period at which that regular expiration will take place, or whether it will ever take place, may be dubious and contingent ; but if its determining qualities are not extrinsic and merely collateral to the original limitation of the particular estate, but are incorporated into and make part of such limitation, those determining qualities contribute to form the original measure of the particular estate : and when the determining event happens, so that the first estate ceases, before the period at which, without the introduction of such determining quality, it would have expired, still it is equally sup-

finer and limited by the words of its creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is denominated a *limitation*: as when land is granted to a man *so long as* he is parson of Dale, or *while* he continues unmarried, or *until* out of the rents and profits he shall have made 500*l.* and the

posed to have filled its original measure, and to expire at the time originally fixed for its expiration. The next limitation, consequently, will take effect as a remainder, not as a conditional limitation. Perhaps the difference is artificial, and such as common sense alone would not teach; but in legal construction, and in several legal consequences of great importance to the interests of the parties claiming under such limitations, the distinction is established.

In order to give effect to a remainder over, (*Andrews v. Fulham*, 2 Str. 1092; *Murray v. Jones*, 2 Ves. & Bea. 320,) or to make a testator's whole disposition of his estate consistent, technical words, which in a deed would create a condition, may, in a testamentary instrument, be construed as words of limitation. (*Newes et Ux. v. Lark and Hunt*, commonly cited as *Scolastica's case*, Plowd. 412; *Rundall v. Eeley*, Carter's Rep. temp. Bridgm. 171; *Boraston's case*, 3 Rep. 21 a.; *Haynsworth v. Pretty*, Cro. Eliz. 833, 920; *Simpson v. Vickers*, 14 Ves. 346.) Lord Kenyon observed, there are many cases in which devises, sounding conditionally, have not been considered as dependent on a preceding condition, but in which the party has taken the benefit devised, whether the event alluded to in connexion with the gift has happened or not. (*Parry v. Boodle*, 1 Cox, 184, citing *Jones v. Westcomb*, Prec. in Cha. 316, and *Gulliver v. Wicket*, 1 Wils. 105.) And Lord Hardwicke said, he knew no case of a remainder or conditional limitation over, of

real estate, in which, if the precedent limitation, by any means whatsoever, were put out of the case, the subsequent limitation must not take place. (*Avelyn v. Ward*, 1 Ves. sen. 422.) But, where a different exposition is not necessary to give effect to the intention of a testator, plain words of condition must be expounded, and have effect given to them according to the common law. (*Curtis v. Wolverston*, Cro. Jac. 57.) All courts, however, are disposed, as far as the rules of law admit, to aid, by construction, the intention of a testator: if, therefore, in a will, there be no express limitation over, to take effect upon the breach of a proviso annexed to the preceding estate, although such proviso is so framed as to admit its being construed as a limitation, it *may* be considered as a condition, if that construction will best answer the apparent intention of the devisor; (*Gulliver v. Ashby*, 4 Burr. 1943; and see *Miles v. Leigh*, 1 Atk. 574;) as, on the other hand, words of apparent condition may be controlled by the context; and, as we have seen, either be understood as words of limitation, (*Murray v. Jones*, 2 Ves. & Bea. 320, 322; *Meadows v. Parry*, 1 Ves. & Bea. 124; *Pearsall v. Simpson*, 15 Ves. 33; *Lane v. Goudge*, 9 Ves. 230,) or, under peculiar circumstances, as raising a trust only. (*Taylor v. George*, 2 Ves. & Bea. 381; *Oke v. Heath*, 1 Ves. sen. 135.) The extract from Reg. Lib. which Mr. Belt has inserted in his Supplem. makes the last cited case still stronger, as it appears the testator used words of express condition.

like (n). In such cases the estate determines as soon as the contingency happens, (when he ceases to be parson, marries a wife, or has received the 500*l.*), and the next subsequent estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy. But when an estate is, strictly speaking, upon *condition in deed* (as if granted expressly *upon condition* to be void upon the payment of 40*l.* by the grantor, or *so that* the grantee continues unmarried, or *provided* he goes to York, &c. (o)), the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heirs or assigns take advantage of the breach of the condition, and make either an entry or a claim in order to avoid the estate (p). But, though strict words of condition be used in the creation of the estate, yet, if on breach of the condition the estate be limited over to a third person, and does not immediately revert to the grantor or his representatives, (as if an estate be granted by A. to B., on condition that within two years B. intermarry with C., and on failure thereof then to D. and his heirs,) this the law construes to be a limitation and not a *condition (q): because, if it were a condition, then, upon the breach thereof, only A. or his representatives could avoid the estate by entry, and so D.'s remainder might be defeated by their neglecting to enter; but, when it is a limitation, the estate of B. determines, and that of D. commences, and he may enter on the lands, the instant that the failure happens. So also, if a man by his will devises land to his heir at law, on condition that he pays a sum of money, and for non-payment devises it over, this shall be considered as a limitation; otherwise no advantage could be taken of the non-payment, for none but the heir himself could have entered for a breach of condition (r).

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In all these instances, of limitations or conditions subsequent, it is to be observed, that so long as the condition, either express or implied, either in deed or in law, remains unbroken, the grantee may have an estate of freehold, provided the estate upon which such condition is annexed be in

Of the nature of the tenant's interest.

(n) 10 Rep. 41.

(q) 1 Vent. 202.

(o) Ibid. 42.

(r) Cro. Eliz. 205; 1 Roll. Abr.

(p) Litt. s. 347; Stat. 32 Hen. VIII. 411.

c. 34.

itself of a freehold nature ; as if the original grant express either an estate of inheritance, or for life ; or no estate at all, which is constructively an estate for life. For, the breach of these conditions being contingent and uncertain, this uncertainty preserves the freehold (s) ; because the estate is capable to last for ever, or at least for the life of the tenant, supposing the condition to remain unbroken. But where the estate is at the utmost a chattel interest, which must determine at a time certain, and may determine sooner, (as a grant for ninety-years, provided A. B. and C. or the survivor of them, shall so long live,) this still continues a mere chattel, and is not, by such its uncertainty, ranked among estates of freehold.

Conditions how
avoided.

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These express conditions, if they be *impossible* at the time of their creation, or afterwards become impossible by the act of God or the act of the feoffor himself, or if they be *contrary to law*, or *repugnant* (10) to the nature of the estate, are void. In any of which cases, if they be conditions *subsequent*, that ^{*}is, to be performed after the estate is vested, the estate shall become absolute in the tenant. As, if a feoffment be made to a man in fee-simple, on condition that, unless he goes to Rome in twenty-four hours, or unless he marries with Jane S. by such a day, (within which time the woman dies, or the feoffor marries her himself,) or unless he kills another, or in case he alienes in fee ; then and in any of such cases the estate shall be vacated and determined : here the condition is void, and the estate made absolute in the feoffee. For he hath by the grant the estate vested in him, which shall not be defeated afterwards by a condition either impossible, illegal, or repugnant (t). But if the condition be *precedent*, or to be performed before the estate vests, as a grant to a man that, if he kills another or goes to Rome in a day, he shall have an estate in fee ; here, the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by

(s) Co. Litt. 42.

(t) Co. Litt. 206.

(10) Conditions which are repugnant to a previous gift or limitation, are void. (*Bradley v. Peixoto*, 3 Ves. 325 ; *Britton v. Twining*, 3 Meriv. 184.) *A fortiori* conditions subse-

quent, which are impossible to be performed, or which are illegal, are merely nugatory. (*Mildmay's case*, 6 Rep. 41 a ; *Mary Portington's case*, 10 Rep. 39 a.)

the grant ; for he hath no estate until the condition be performed (*u*) (11).

There are some estates defeasible upon condition subsequent, that require a more peculiar notice. Such are,

III. Estates held *in vadio*, in *gage*, or pledge : which are of two kinds, *vivum vadium*, or living pledge ; and *mortuum vadium*, dead pledge, or *mortgage*. III. Estates held in pledge.

Vivum vadium, or living pledge, is when a man borrows a sum (suppose 200*l.*) of another, and grants him an estate, as of 20*l.* *per annum*, to hold till the rents and profits shall repay the sum so borrowed. This is an estate conditioned to be void, as soon as such sum is raised. And in this case the land or pledge is said to be living ; it subsists and survives the debt ; and, immediately on the discharge of that, results back to the borrower (*w*) (12). But *mortuum vadium*, a dead pledge, or *mortgage*, (which is much more common than the other,) is where a man borrows of another a specific sum (*e. g.* 200*l.*) *and grants him an estate in fee, on condition that if he, the mortgagor, shall repay the mortgagee the said sum of 200*l.* on a certain day mentioned in the deed, that then the mortgagor may re-enter on the estate so granted in pledge ; or, as is now the more usual way, that then the mortgagee shall reconvey the estate to [* 158]

(*u*) Co. Litt. 206.

(*w*) Co. Litt. 205.

(11) The Court of Chancery has in many cases interposed to moderate the rigour of the common law, with respect to the consequences of breaches of conditions : and it seems to be settled, that the substantial difference which guides courts of equity in granting or refusing their interference, is a consideration, not whether the conditions be precedent or subsequent, but whether a compensation for the breach thereof can, or cannot, be made. (*Hayward v. Angell*, 1 Vern. 222 ; *Wafer v. Mocatto*, 9 Mod. 113 ; *Grimstone v. Lord Bruce*, 1 Salk. 156.)

(12) In cases of this kind (which are termed Welsh mortgages,) as the proviso for redemption does not oblige the mortgagor to pay the money on a

particular day, but allows him an indefinite time for so doing ; courts of equity will effectuate the agreement of the parties, and a redemption will be decreed at any time within twenty years *after the debt has been* fully satisfied and *paid*. (*Ord v. Heming*, 1 Vern. 418 ; *Howell v. Price*, Prec. in Cha. 424 ; *Yates v. Hambly*, 2 Atk. 363 ; *Fenwick v. Reed*, 1 Meriv. 120, 125.) This perpetual right of redemption, however, may be lost by a subsequent agreement, putting it in the power of the mortgagee to limit the time within which the mortgage debt must be repaid, or the equity of redemption become liable either to a decree of foreclosure, or to be lost by length of time. (*Hartpole v. Walsh*, 4 Br. P. C. 381, fol. edit.)

the mortgagor: in this case, the land which is so put in pledge, is by law, in case of non-payment at the time limited, for ever dead and gone from the mortgagor; and the mortgagee's estate in the lands is then no longer conditional, but absolute. But, so long as it continues conditional, that is, between the time of lending the money, and the time allotted for payment, the mortgagee is called tenant in mortgage (*x*). But as it was formerly a doubt (*y*), whether by taking such estate in fee, it did not become liable to the wife's dower (13), and other incumbrances, of the mortgagee, (though that doubt has been long ago over-ruled by our courts of equity (*z*),) it therefore became usual to grant only a long term of years by way of mortgage; with condition to be void on re-payment of the mortgage-money: which course has been since pretty generally continued, principally because on the death of the mortgagee such term becomes vested in his personal representatives, who alone are entitled in equity to receive the money lent, of whatever nature the mortgage may happen to be.

Of the equity of redemption in mortgages.

As soon as the estate is created, the mortgagee may immediately enter on the lands; but is liable to be dispossessed upon performance of the condition by payment of the mortgage-money at the day limited. And therefore the usual way is to agree that the mortgagor shall hold the land till the day assigned for payment; when, in case of failure, whereby the estate becomes absolute, the mortgagee may enter upon it and take possession, without any possibility *at law* of being afterwards evicted by the mortgagor, to whom the land is now for ever dead. But here again the courts of equity interpose; and, though a mortgage be thus forfeited, and the

[* 159] *estate absolutely vested in the mortgagee at the common law, yet they will consider the real value of the tenements compared with the sum borrowed. And, if the estate be of greater value than the sum lent thereon, they will allow the mortgagor at any reasonable time (14) to recall or redeem his

(*x*) Litt. s. 332.

(*z*) Hardr. 466.

(*y*) Ibid. s. 357; Cro. Car. 191.

(13) See *ante*, p. 137, note.

(14) The policy of the statute of limitations of 32 Hen. VIII. c. 2, and of the more recent statute of 3 & 4

Gul. IV. c. 27, applies as strongly to a mortgaged estate as to any other. So long as the estate can be shown to have been treated as a pledge, so long

estate; paying to the mortgagee his principal, interest, and expenses: for otherwise, in strictness of law, an estate worth

there is a recognition of the mortgagor's title: (*Hodde v. Healey*, 1 Ves. & Bea. 540; *S. C.* 6 Mad. 181; *Grubb v. Woodhouse*, 2 Freem. 187:) but after a mortgagee has been in possession twenty years, the mortgagor is barred; unless in the mean time the mortgagee has given a written acknowledgment of the title of the mortgagor; and in that case the mortgagor is barred unless he brings his suit within twenty years after such acknowledgment; at any rate unless his situation bring him within some of the savings of the statute. (*Marquis of Cholmondeley v. Lord Clinton*, 2 Jac. & Walk. 180, *et seq.*; *Whiting v. White*, Coop. 4; *S. C.* 2 Cox, 300; *Barren v. Martin*, 19 Ves. 327.) To show that an estate has been treated as one affected by a subsisting mortgage, within twenty years immediately preceding a bill brought for redemption, parol evidence was formerly admissible. (*Reeks v. Postlethwaite*, Coop. 170; *Perry v. Marston*, cited 2 Cox, 295; *Edsell v. Buchanan*, 2 Ves. junr. 84.) But the late act excludes all proof except a written acknowledgment signed by the mortgagee.

In the case of *Montgomery v. The Marquis of Bath*, (3 Ves. 560,) a decree was made for a foreclosure as to the share of one of several joint mortgagees: but, it is to be observed, no opposition was made by the mortgagor in that case; and it is very doubtful whether a decree for a partial foreclosure ought ever to be made. (See *Cockburn v. Thompson*, 16 Ves. 324, n.) It is, at all events, certain, there can be no foreclosure or redemption, unless the whole of the parties entitled to any share of the mortgage money are before the court: (*Lowe v. Morgan*, 1 Br. 368; *Palmer v. The Earl of Carlisle*, 1 Sim. & Stu. 425:) it

being always the object of a court of equity to make a complete decree, embracing the whole subject, and determining (as far as possible) the rights of all the parties interested. (*Palk v. Clinton*, 12 Ves. 58; *Cholmondeley v. Clinton*, 2 Jac. & Walk. 134.) Upon analogous principles, not only the mortgagor but a subsequent mortgagee, who comes to redeem the mortgage of a prior mortgagee, must offer to redeem it entirely; although the second mortgage may affect only part of the estates comprised in the first, and the titles are different. (*Palk v. Clinton*, 12 Ves. 59; *Reynolds v. Lowe*, cited from Forrester's MS. in 1 Hoven-den's Suppl. to Ves. junr. 280.) It is true that Lord Hardwicke (in *Ex parte King*, 1 Atk. 300,) intimated a doubt whether it was an established rule of the court, that a mortgagor who has borrowed, from the same party, money on the security of two estates, shall be compelled to redeem both, if he will have back either estate: but it had previously been decided, that, in such cases, if one of the securities proves to be scanty, the mortgagor, shall not be allowed to bring his bill for the redemption of the other mortgage only: (*Purefoy v. Purefoy*, 1 Vern. 29; *Shuttleworth v. Laycock*, 1 Vern. 245; *Pope v. Onslow*, 2 Vern. 286;) and modern cases have confirmed the doctrine, that the mortgagee may insist on being redeemed as to both his demands, or neither; with this reasonable restriction, however, that a man who happens to be engaged with another in one mortgage only, may redeem the same, though the other person concerned therein has also pledged another estate. (*Jones v. Smith*, 2 Ves. junr. 376; *Cator v. Charlton*, and *Collett v. Munden*, cited 2 Ves. junr. 377.)

1000*l.* might be forfeited for non-payment of 100*l.* or a less sum. This reasonable advantage, allowed to mortgagors, is called the *equity of redemption*: and this enables a mortgagor to call on the mortgagee, who has possession of his estate, to deliver it back and account for the rents and profits received, on payment of his whole debt and interest; thereby turning the *mortuum* into a kind of *vivum vadium*. But, on the other hand, the mortgagee may either compel the sale of the estate, in order to get the whole of his money immediately: or else call upon the mortgagor to redeem his estate presently, or, in default thereof, to be for ever *foreclosed* from redeeming the same; that is, to lose his equity of redemption without possibility of recall. And also, in some cases of fraudulent mortgages (*a*), the fraudulent mortgagor forfeits all equity of redemption whatsoever (15). It is not, however, usual for mortgagees to take possession of the mortgaged estate, unless where the security is precarious, or small; or where the mortgagor neglects even the payment of interest: when the mortgagee is frequently obliged to bring an ejectment (16), and take the land into

(*a*) Stat. 4 & 5 W. & M. c. 16.

(15) By the statute of 4 & 5 W. & M. c. 16, it is enacted, that, if a debtor upon judgment, statute, or recognizance, takes up money from another lender upon mortgage, without giving him notice of such former incumbrance, in writing under the debtor's hand, before the execution of the mortgage, all equity of redemption shall be lost, unless such mortgagor, upon notice in writing, under the hand and seal of the mortgagee, attested by two or more witnesses, of any such former incumbrance, shall within six months discharge the same. And any person mortgaging the same lands, or any part thereof, more than once, without notice to the subsequent mortgagees of the prior mortgage or mortgages, in writing under the hand of the mortgagor, shall lose all equity of redemption; but any subsequent mortgagee may redeem a former mortgage. Upon this statute it has been resolved,

that a mortgage thus made irredeemable by the mortgagor, shall be alike irredeemable by him, whether the estate remains in the hands of the first mortgagee, or of his assignee, or of a subsequent mortgagee, who has redeemed the prior mortgage. (*Stafford v. Selby*, 2 Vern. 590.)

(16) Mr. Christian, in his note upon this passage of the text, observes that "the mortgagee is not now obliged to bring an ejectment to recover the rents and profits of the estate; for it has been determined, that, where there is a tenant in possession, by a lease prior to the mortgage, the mortgagee may at any time give him notice to pay the rent to him; and he may distrain for all the rent which is due at the time of the notice, and also for all that accrues afterwards. (*Moss v. Gallimore*, Doug. 266.) The mortgagor has no interest in the premises, but by the mere indulgence of the mortgagee; he

his own hands (17) in the nature of a pledge, or the *pignus* of the Roman law, whereas, while it remains in the hands of the mortgagor, it more resembles their *hypotheca*, which was where the possession of the thing pledged remained with the debtor (b). But, by the statute 7 Geo. II. c. 20, after payment or tender by the mortgagor of principal, interest, and costs, the mortgagee can maintain no ejectment; but may be compelled to re-assign his securities. In Glanvil's time, when the universal method of conveyance was by livery of seisin *or corporal tradition of the lands, no gage or pledge of lands was good unless possession was also delivered to the creditor; "*si non sequatur ipsius vadii traditio, curia domini regis hujusmodi privatas conventiones tueri non solet*:" for which the reason given is, to prevent subsequent and fraudulent pledges of the same land: "*cum in tali casu possit eadem res pluribus aliis creditoribus tum prius tum posterius invadiari*" (c). And the frauds which have arisen, since the exchange of these

(b) *Pignoris appellatione eam proprie rem contineri dicimus, quæ simul etiam traditur creditori. At eam, quæ sine traditione nuda conventiones tene-*

tur, proprie hypothecæ appellatione contineri dicimus. Inst. l. 4, t. 6, s. 7.

(c) L. 10, c. 8.

has not even the estate of a tenant at will, for it is held he may be prevented from carrying away the emblements, or the crops which he himself has sown. Ib.

"If the mortgagor grants a lease after the mortgage, the mortgagee may recover the possession of the premises in an ejectment against the tenant in possession without a previous notice to quit, 3 East, 449." [See also *Keech v. Hall*, Dougl. 21, and *Alchorne v. Gomme*, 2 Bing. 62, 9 J. B. Moore, 130.—ED.]

(17) If a mortgagee, after recovering in ejectment, refuses to enter, either through collusion with the tenant, and to the detriment of the mortgagor; (*Duke of Buckingham v. Gayer*, 1 Vern. 258;) or, *vice versâ*, by collusion with the mortgagor, thereby enabling him to take the profits, yet, by means of the mortgage, to fence

with his other creditors; (*Chapman v. Tanner*, 1 Vern. 267;) he will be charged with the rent he might have received: as he will, at the suit of other creditors, when, after entry, he has allowed the mortgagor to continue in receipt of the profits: (*Coppring v. Cooke*, 1 Vern. 270; *Maddocks v. Wren*, 2 Cha. Rep. 209;) or, at least, if not charged with the whole rents, he will be deprived of his right to charge interest against the estate, so as to delay a subsequent mortgagee. (*Bentham v. Haincourt*, Prec. in Cha. 30; *Loftus v. Swift*, 2 Sch. & Lef. 656.) A mortgagee, entering, is to take the fair rents and profits. He is not bound to engage in adventures and speculations for the benefit of the mortgagor; and if he do so speculate, it must be at his own hazard, should loss ensue. (*Hughes v. Williams*, 12 Ves. 496.)

public and notorious conveyances for more private and secret bargains, have well evinced the wisdom of our ancient law (18) (19).

(18) Mr. Christian observes, that "where an estate is divided, it is impossible for every one who has a share to have the title deeds; in a sale, therefore, under an order of the Court of Chancery, the chancellor directs one to retain the title deeds, but to covenant to produce them when called upon, to support the title of the other purchasers."

(19) An experiment made in the counties of York and Middlesex, to counteract, by registration, the inconveniences alluded to in the text, is mentioned by our author (at the close of the 20th chapter of this volume, p. 343,) as one of very doubtful utility in practice, however plausible in theory: but, the opinion of the public, it is believed, is becoming favourable to a general registration, as a measure of practical advantage. The details, no doubt, will require cautious consideration.

If a mortgagee neglect to take possession of, or if he part with, the title deeds of the mortgaged property, with a view to enable the mortgagor to commit frauds upon third persons; he will be postponed to incumbrancers who have been deceived, and induced to advance money, by his collusion with the mortgagor: but the mere circumstance of not taking, or keeping, possession of the title deeds, is not, of itself, a sufficient ground for postponing the first mortgagee; unless there be fraud, concealment, or some such purpose, or concurrence in such purpose; or that gross negligence which amounts to evidence of a fraudulent intention: (*Evans v. Bicknell*, 6 Ves. 190; *Martinez v. Cooper*, 2 Russ. 216; *Barnett v. Weston*, 12 Ves. 133; *Bailey v. Fermor*, 9 Pr. 267; *Peter v. Russell*, Gilb. Eq. Rep. 123:) and, of course, a prior incumbrancer,

to whose charge on the estate possession of the title deeds is not a necessary incident, cannot be postponed to subsequent incumbrancers, because he is not in possession of the title deeds. (*Harper v. Faulder*, 4 Mad. 138; *Tourle v. Rand*, 2 Br. 652.)

Among mortgagees, where none of them have the legal estate, the rule in equity is, that, *qui prior est tempore potior est jure*; and the several incumbrances must be paid according to their priority in point of time. (*Brace v. Duchess of Marlborough*, 2 P. Wms. 495; *Clarke v. Abbot*, Bernard. Ch. Rep. 460; *Earl of Pomfret v. Lord Windsor*, 2 Ves. sen. 486; *Maundrell v. Maundrell*, 10 Ves. 260; *Mackreth v. Symmons*, 15 Ves. 354.) But when, of several persons having equal equity in their favour, one has been fortunate, or prudent, enough to get in the legal estate; he may make all the advantage thereof which the law admits, and thus protect his title, though subsequent in point of time to that of other claimants; courts of equity will not interfere in such cases, but leave the law to prevail. In conformity to this settled doctrine, if an estate be encumbered with several mortgage debts, the last mortgagee, provided he lent his money *bonâ fide* and without notice, may, by taking in the first incumbrance, carrying with it the legal estate, protect himself against any intermediate mortgage: no *mesne* mortgagee can take the estate out of his hands, without redeeming the last incumbrance as well as the first. (*Wortley v. Birkhead*, 2 Ves. sen. 573; *Morret v. Paske*, 2 Atk. 53; *Frere v. Moore*, 8 Pr. 487; *Barnett v. Weston*, 12 Ves. 135.) But, to support the doctrine of tacking, the fairness of the circumstances under which the loan desired to be tacked

IV. A fourth species of estates, defeasible on condition subsequent, are those held by *statute merchant*, and *statute staple*; which are very nearly related to the *vivum vadium* before mentioned, or estate held till the profits thereof shall discharge a debt liquidated or ascertained. For both the statute merchant and statute staple are securities for money; the one entered into before the chief magistrate of some trading town, pursuant to the statute 13 Edw. I. *de mercatoribus*, and thence called a statute merchant; the other pursuant to the statute 27 Edw. III. c. 9, before the mayor of the staple, that is to say, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by act of parliament in certain trading towns (*d*), from whence this security is called a statute staple. They are both, I say, securities for debts acknowledged to be due; and originally permitted only among traders, for the benefit of commerce; whereby not only the body of the debtor may be imprisoned, and his goods seized in satisfaction of the debt, but also his lands may be delivered to the creditor, till out of the rents and profits of them the debt may be satisfied; and, during such time as the creditor so holds the lands, he is tenant by statute merchant or statute staple. There is also a similar security,

IV. Estates by statute merchant, or statute staple.

(*d*) See book i. c. 8, Vol. I. p. 314.

was made, must be liable to no impeachment: (*Maundrell v. Maundrell*, 10 Ves. 260 :) and, though the point has never called for decision, it has been said to be very doubtful,—whether a third mortgagee, by taking in the first mortgage, can exclude the second, if the first mortgagee, when he conveyed to the third, knew of the second. (*Mackreth v. Symmons*, 15 Ves. 335.) Indisputably, a mortgagee purchasing the mortgagor's equity of redemption, or a *puisne* incumbrancer, cannot set up a prior mortgage of his own, (nor, consequently, a mortgage which he has got in,) against *mesne* incumbrances of which he had notice. (*Toulmin v. Steere*, 3 Meriv. 224; *Mocatta v. Murgatroyd*, 1 P. Wms. 393; *Morret v. Paske*, 2 Atk. 62.)

Upon analogous principles, if the first mortgagee stood by, without disclosing his own incumbrance on the estate, when the second mortgagee advanced his money, under the persuasion that the estate was liable for no prior debt; the first mortgagee, in just recompense of his fraudulent concealment, will be postponed to the second. And the rule, as well as the reason, of decision is the same, where the mortgagor has gained any other advantage, in subsequent dealings respecting the mortgaged estate, by the connivance of the mortgagee. (*Becket v. Cordley*, 1 Br. 357; *Berrisford v. Milward*, 2 Atk. 49.) Part of this note is extracted from Hovenden on Frauds, Vol. II. pp. 183, 196.

the recognizance in the nature of a statute staple, acknowledged before either of the chief justices, or (out of term) before their substitutes, the mayor of the staple at Westminster and the recorder of London; whereby the benefit of this mercantile transaction is extended to all the king's subjects in general, by virtue of the statute 23 Hen. VIII. c. 6, amended by 8 Geo. I. c. 25, which directs such recognizances to be enrolled and certified into Chancery. But these, by the statute of frauds, 29 Car. II. c. 3, are only binding upon the lands in the hands of *bonâ fide* purchasers, from the day of their employment, which is ordered to be marked on the record (20).

V. Estates by
elegit.

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V. Another similar conditional estate, created by operation of law, for security and satisfaction of debts, is called an *estate by *elegit*. What an *elegit* is, and why so called, will be explained in the third part of these commentaries (21). At present I need only mention, that it is the name of a writ, founded on the statute (*e*) of Westm. 2, by which, after a plaintiff has obtained judgment for his debt at law, the sheriff gives him possession of one half of the defendant's lands and tenements, to be occupied and enjoyed, until his debt and damages are fully paid: and during the time he so holds them, he is called tenant by *elegit*. It is easy to observe, that this is also a mere conditional estate defeasible as soon as the debt is levied. But it is remarkable that the feudal restraints of alienating lands, and charging them with the debts of the owner, were softened much earlier, and much more effectually for the benefit of trade and commerce, than for any other consideration. Before the statute of *quia emptores* (*f*), it is generally thought that

(*e*) 13 Edw. I. c. 18.

(*f*) 18 Edw. I.

(20) Mr. Christian, in his annotation upon the text above, observes, "these estates are sometimes referred to in argument, but are now unknown in practice." Mr. Wooddeson, however, speaking of the same subject, (in his 24th Vin. Lect.) says, "these kinds of interest are considerably fallen into disuse; but the doctrine on the subject is not unnecessary to be attended to, as instances of such re-

cognizances still sometimes occur, and form an incumbrance, requisite to be guarded against in perfecting a safe and complete title to estates." The reader who is disposed to go into the subject, will find an able summary thereof in Mr. Serjt. Williams' 3d note to the case of *Underhill v. Devereux*. (2 Saund. 69 c.)

(21) See chap. 26, Vol. III. p. 418, and Vol. IV. p. 426.

the proprietor of lands was enabled to alienate no more than a moiety of them : the statute therefore of Westm. 2, permits only so much of them to be affected by the process of law, as a man was capable of alienating by his own deed. But by the statute *de mercatoribus* (passed in the same year (g)) the *whole* of a man's lands was liable to be pledged in a statute merchant, for a debt contracted in trade ; though only *half* of them was liable to be taken in execution for any other debt of the owner.

I shall conclude what I had to remark of these estates, by statute merchant, statute staple, and *elegit*, with the observation of Sir Edward Coke (h). “ These tenants have uncertain interests in lands and tenements, and yet they have but chattels and no freeholds ;” (which makes them an exception to the general rule) “ because, though they may hold an estate of inheritance, or for life, *ut liberum tenementum*, until their debt be paid ; yet it shall go to their executors : for *ut* is similitudinary ; and though, to recover their estates, they shall have the same remedy (by assise) as a tenant of the freehold shall have (i), yet it is but the similitude of a freehold, and *nullum simile est idem*.” This indeed only proves them to be chattel interests, because they go to the executors, which is inconsistent with the nature of a freehold : but it does not assign the reason why these estates, in contradistinction to other uncertain interests, shall vest in the executors of the tenant and not the heir ; which is probably owing to this : that, being a security and remedy provided for personal debts due to the deceased, to which debts the executor is entitled, the law has therefore thus directed their succession (22) ; as judging it reasonable,

Of the interest
of the tenant by
elegit.

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(g) 13 Edw. I.

(h) 1 Inst. 42, 43.

(i) The words of the statute *de*

mercatoribus are “ *puisse porter bref de novele disseisine, auxi sicum de franktenement*.”

(22) Mr. Wooddeson (in his 24th Vin. Lect.) remarks, that the reason assigned by our author why estates by statute-merchant and statute-staple, (which are estates on condition, because they are holden by the creditor until his debt be satisfied, that is, in the nature of a conditional limitation,) are not in law *freehold* interests,

though uncertain and indeterminate as to their duration ; is a reason very conformable to the rules which prevail in courts of equity on this subject : but why (Mr. Wooddeson asks) should it prevent the *legal* vesting of the freehold in these instances, any more than in the case of a mortgage in fee ? The reason (he suggests, in answer to

from a principle of natural equity, that the security and remedy should be vested in those to whom the debts, if recovered, would belong. For, upon the same principle, if lands be devised to a man's executor, until out of their profits the debts due from the testator be discharged, this interest in the lands shall be a chattel interest, and on the death of such executor shall go to *his* executors (*k*): because they being liable to pay the original testator's debts, so far as his assets will extend, are in reason entitled to possess that fund out of which he has directed them to be paid.

(*k*) Co. Litt. 42.

his own query,) may perhaps depend on the manner in which these estates vest, *viz.* by the issuing of the *liberate*, which is not a judgment in a real action, nor bears any analogy to the various ways by which freehold interests may be acquired. It seems, however, as an interest under an extent is a species of estate entirely introduced by statute law, (*Dighton v. Greenvil*, 2 Ventr. 327,) our ancient lawyers might, with more propriety, have allowed it to be a freehold interest of a peculiar kind, namely, not

descendible, but such as by possibility might come to executors; like estates for lives, since the abolition of common occupancy. For, the statute of 13 Edw. I. st. 3, says, the conusee shall have *seisin*, a term applicable only to freehold: and the statute 27 Edw. III. st. 2, c. 9, expressly declares he shall have an estate of *frank-tenement*; and he is entitled to the same *remedies* to recover the lands, if he is ousted, as other freeholders enjoy. (See Fitzh. N. B. 439; Co. Litt. 43 b.)

CHAPTER XI.

OF ESTATES IN POSSESSION, REMAINDER,
AND REVERSION.

HITHERTO we have considered estates solely with regard to their duration, or the *quantity of interest* which the owners have therein. We are now to consider them in another view ; with regard to the *time of their enjoyment*, when the actual permanency of the profits (that is, the taking, perception, or receipt, of the rents and other advantages arising therefrom) begins. Estates, therefore, with respect to this consideration, may either be in *possession* or in *expectancy* : and of expectancies there are two sorts ; one created by the act of the parties, called a *remainder* ; the other by act of law, and called a *reversion*.

Of the time of enjoyment of estates—which may either be in possession or in expectancy.

I. Of estates in *possession*, (which are sometimes called estates *executed*, whereby a present interest passes to and resides in the tenant, not depending on any subsequent circumstance or contingency, as in the case of estates *executory*,) there is little or nothing peculiar to be observed. All the estates we have hitherto spoken of are of this kind ; for, in laying down general rules, we usually apply them to such estates as are then actually in the tenant's possession. But the doctrine of estates in expectancy contains some of the nicest and most abstruse learning in the English law. These will therefore require a minute discussion, and demand some degree of attention.

I. Estates in possession.

II. An estate then in remainder may be defined (1) to be,

II. Estate in remainder—an

(1) Mr. Butler, (in his first note to the first chapter of Fearne's *Ess. on Cont. Rem.*) minutely examines and explains every part of Lord Coke's

definition of a remainder. To the invaluable work of Mr. Fearne, the reader is, once for all, referred, for a solution of any doubt or difficulty,

estate limited to take effect after another estate is determined.

an estate limited to take effect and be enjoyed after another estate is determined. As if a man seised in fee-simple granteth lands to A. for twenty years, and, after the determination of the said term, then to B. and his heirs for ever : here A. is tenant for years, remainder to B. in fee. In the first place, an estate for years is created or carved out of the fee, and given to A. ; and the residue or remainder of it is given to B. But both these interests are in fact only one estate ; the present term of years and the remainder afterwards, when added together, being equal only to one estate in fee (*a*). They are indeed different *parts*, but they constitute only one *whole* : they are carved out of one and the same inheritance : they are both created, and may both subsist, together ; the one in possession, the other in expectancy. So, if land be granted to A. for twenty years, and after the determination of the said term to B. for life ; and after the determination of B.'s estate for life, it be limited to C. and his heirs for ever : this makes A. tenant for years, with remainder to B. for life, remainder over to C. in fee. Now here the estate of inheritance undergoes a division into three portions ; there is first A.'s estate for years carved out of it : and after that B.'s estate for life ; and then the whole that remains is limited to C. and his heirs. And here also the first estate, and both the remainders, for life and in fee, are one estate only ; being nothing but parts or portions of one entire inheritance : and if there were a hundred remainders, it would still be the same thing : upon a principle grounded in mathematical truth, that all the parts are equal, and no more than equal, to the whole. And hence also it is easy to collect, that no remainder can be limited after the grant of an estate in fee-simple (*b*) (2) : because a fee-simple is the highest and largest estate that a subject is capable of enjoying ; and he that is tenant in fee hath in him the *whole* of the estate : a remainder therefore, which is only a portion, or residuary *part*, of the estate, can-

(*a*) Co. Litt. 143.

(*b*) Plowd. 29 ; Vaugh. 269.

with which he may be embarrassed, in the examination of the doctrines of contingent remainders and executory devises.

(2) Nor after a qualified or base fee. (Co. Litt. 18 a ; *Edward Seymour's case*, 10 Rep. 97 b ; and see *ante*, p. 110, with the notes thereto.)

not be reserved after the whole is disposed of. A particular estate, with all *the remainders expectant thereon, is only one fee-simple; as 40*l.* is part of 100*l.*, and 60*l.* is the remainder of it: wherefore, after a fee-simple once vested, there can no more be a remainder limited thereon, than after the whole 100*l.* is appropriated there can be any residue subsisting. [* 165]

Thus much being premised, we shall be the better enabled to comprehend the rules that are laid down by law to be observed in the creation of remainders, and the reasons upon which those rules are founded. Of the rules to be observed in the creation of remainders.

1. And, first, there must necessarily be some particular estate, precedent to the estate in remainder (c) (3). As, an estate for years to A., remainder to B. for life; or, an estate for life to A., remainder to B. in tail. This precedent estate is called the *particular* estate, as being only a small part, or *particula*, of the inheritance; the residue or remainder of which is granted over to another. The necessity of creating this preceding particular estate, in order to make a good remainder, arises from this plain reason; that *remainder* is a relative expression, and implies that some part of the thing is previously disposed of: for where the whole is conveyed at once, there cannot possibly exist a remainder; but the interest granted, whatever it be, will be an estate in possession. 1. There must be some estate precedent to the estate in remainder; which is called the particular estate.

An estate created to commence at a distant period of time, without any intervening estate, is therefore properly no remainder: it is the whole of the gift, and not a residuary part. And such future estates can only be made of chattel interests, which were considered in the light of mere contracts by the ancient law (d), to be executed either now or hereafter, as the contracting parties should agree; but an estate of freehold must be created to commence immediately. For it is an ancient rule of the common law, that an estate of freehold cannot be created to commence *in futuro*; but it ought to take effect presently, either in possession or remainder (e): because at *common law no freehold in lands [* 166]

(c) Co. Litt. 49; Plowd. 25.

(e) 5 Rep. 94.

(d) Raym. 151.

(3) See *ante*, p. 113, note, and *post*, p. 168, note.

could pass without livery of seisin ; which must operate either immediately, or not at all. It would therefore be contradictory, if an estate, which is not to commence till hereafter, could be granted by a conveyance which imports an immediate possession (4). Therefore, though a lease to A. for seven years, to commence from next Michaelmas, is good ; yet a conveyance to B. of lands, to hold to him and his heirs for ever from the end of three years next ensuing, is void. So that when it is intended to grant an estate of freehold, whereof the enjoyment shall be deferred till a future time, it is necessary to create a previous particular estate, which may subsist till that period of time is completed ; and for the grantor to deliver immediate possession of the land to the tenant of this particular estate, which is construed to be giving possession to him in remainder, since his estate and that of the particular tenant are one and the same estate in law. As, where one leases to A. for three years, with remainder to B. in fee, and makes livery of seisin to A. ; here by the livery the freehold is immediately created, and vested in B., during the continuance of A.'s term of years. The whole estate passes at once from the grantor to the grantees, and the remainder-man is seised of his remainder at the same time that the termor is possessed of his term. The enjoyment of it must indeed be deferred till hereafter ; but it is to all intents and purposes an estate commencing *in præ-senti*, though to be occupied and enjoyed *in futuro*.

What estate will support a remainder.

As no remainder can be created without such a precedent particular estate, therefore the particular estate is said to *support* the remainder. But a lease at will (5) is not held to be such a particular estate as will support a remainder over (*f*). For an estate at will is of a nature so slender and precarious, that it is not looked upon as a portion of the inheritance ; and a portion must first be taken out of it, in order to constitute a remainder. Besides, if it be a freehold remainder, livery of seisin must be given at the time of its creation ; and the entry of the grantor to do this determines the estate at will *in the very instant in which it is

[* 167]

(*f*) 8 Rep. 75.

(4) See *ante*, chapter 9, p. 144, and note thereto.

(5) See *ante*, p. 145, chapter 9, sect. 2, with the notes thereto.

made (*g*): or if the remainder be a chattel interest, though perhaps the deed of creation might operate as a *future contract*, if the tenant for years be a party to it, yet it is void by way of *remainder*; for it is a separate independent contract, distinct from the precedent estate at will; and every remainder must be part of one and the same estate, out of which the preceding particular estate is taken (*h*). And hence it is generally true, that if the particular estate is void in its creation, or by any means is defeated afterwards, the remainder supported thereby shall be defeated also (*i*): as where the particular estate is an estate for the life of a person not *in esse* (*k*); or an estate for life upon condition, on breach of which condition the grantor enters and avoids the estate (*l*); in either of these cases the remainder over is void.

2. A second rule to be observed is this: that the remainder must commence or pass out of the grantor at the time of the creation of the particular estate (*m*). As, where there is an estate to A. for life, with remainder to B. in fee: here B.'s remainder in fee passes from the grantor at the same time that seisin is delivered to A. of his life estate in possession. And it is this which induces the necessity at common law of livery of seisin being made on the particular estate, whenever a *freehold* remainder is created. For, if it be limited even on an estate for years, it is necessary that the lessee for years should have livery of seisin, in order to convey the freehold from and out of the grantor, otherwise the remainder is void (*n*). Not that the livery is necessary to strengthen the estate for years; but, as livery of the land is requisite to convey the freehold, and yet cannot be given to him in remainder without infringing the possession of the lessee for years, therefore the law allows such livery, made to the tenant of the particular estate, to relate and enure to him in remainder, as both are but one estate in law (*o*).

2. The remainder must pass at the time of the creation of the particular estate;

*3. A third rule respecting remainders is this: that the remainder must vest in the grantee during the continuance of the particular estate, or *eo instanti* that it determines (*p*). [* 168]

3. And must vest in the grantee during the continuance of the

(*g*) Dyer, 18.

(*h*) Raym. 151.

(*i*) Co. Litt. 298.

(*k*) 2 Roll. Abr. 415.

(*l*) 1 Jon. 58.

(*m*) Litt. s. 671; Plowd. 25.

(*n*) Litt. s. 60.

(*o*) Co. Litt. 49.

(*p*) Plowd. 25; 1 Rep. 66.

particular estate,
or *eo instanti*
that it deter-
mines.

As, if A. be tenant for life, remainder to B. in tail: here B.'s remainder is vested in him, at the creation of the particular estate to A. for life: or if A. and B. be tenants for their joint lives, remainder to the survivor in fee; here, though during their joint lives the remainder is vested in neither, yet on the death of either of them, the remainder vests instantly in the survivor: wherefore both these are good remainders. But, if an estate be limited to A. for life, remainder to the eldest son of B. in tail, and A. dies before B. hath any son; here the remainder will be void, for it did not vest in any one during the continuance, nor at the determination, of the particular estate: and even supposing that B. should afterwards have a son, he shall not take by this remainder; for, as it did not vest at or before the end of the particular estate, it never can vest at all, but is gone for ever (*q*). And this depends upon the principle before laid down, that the precedent particular estate, and the remainder, are one estate in law; they must therefore subsist and be *in esse* at one and the same instant of time, either during the continuance of the first estate, or at the very instant when that determines, so that no other estate can possibly come between them. For there can be no intervening estate between the particular estate, and the remainder supported thereby (*r*): the thing supported must fall to the ground, if once its support be severed from it (6).

(*q*) 1 Rep. 138.

(*r*) 3 Rep. 21.

(6) By the feudal law, the freehold could not be vacant, or, as it was termed, in abeyance. (See *ante*, p. 107, note.) There must have been a tenant to fulfil the feudal duties or returns, and against whom the rights of others might be maintained. If the tenancy once became vacant, though but for one instant, the lord was warranted in entering on the lands; and the moment the particular estate ended, by the cession of the tenancy, all limitations of that estate were also at an end. From these principles are deduced the rules, that no *freehold* remainder can be well created, unless it is supported by an immediate estate

of freehold, vested in some person actually in existence, who may answer the *præcipe* of strangers; and also, that it is necessary the remainder should take effect during the existence of such particular estate, or *eo instanti* that it determines. (Watk. on Conv. 94.) But, as to a contingent remainder *for years*, there does not appear to be any necessity for a preceding freehold to support it. For, the remainder not being freehold, no such estate appears requisite to pass out of the grantor, in order to give effect to a remainder of that sort. And although every contingent *freehold* remainder must be supported by a pre-

It is upon these rules, but principally the last, that the doctrine of *contingent* remainders depends. For remainders are either *vested* or *contingent* (7). *Vested* remainders (or remainders *executed*, whereby a present interest passes to the party, though to be enjoyed *in futuro*) are where the estate is invariably fixed, to remain to a determinate person, after the *particular estate is spent. As if A. be tenant for twenty years, remainder to B. in fee; here B.'s is a vested remainder, which nothing can defeat, or set aside. [* 169]

Vested remainders.

Contingent or *executory* remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect, either to a dubious and uncertain *person*, or upon a dubious and uncertain *event*; so that the particular estate may chance to be determined, and the remainder never take effect (s).

Of contingent or executory remainders.

First, they may be limited to a dubious and uncertain *person*. As if A. be tenant for life, with remainder to B.'s eldest son (then unborn) in tail; this is a contingent remainder, for it is uncertain whether B. will have a son or no: but the instant that a son is born, the remainder is no

1. Where the estate is limited to an uncertain person—one unborn;

(s) 3 Rep. 20.

ceding freehold, yet it is not necessary that such preceding estate continue in the actual *seisin* of its rightful tenant; it is sufficient if there subsists a *right* to such preceding estate, at the time the remainder should vest; provided such right be a present right of *entry*, and not a right of action only. A right of *entry* implies the undoubted subsistence of the estate; but when a right of action only remains, it then becomes a question of law whether the same estate continues or not: till that question be determined, upon the action brought, another estate is acknowledged and protected by the law. (See Fearn, ch. 3.) Where the legal estate is vested in trustees, that will be sufficient to support the limitations of contingent remainders; (see *post*, pp. 171, 172;) and there will be no necessity for any other particular estate of freehold; nor need the remain-

ders vest at the time when the preceding trust limitations expire. (*Harbergham v. Vincent*, 2 Ves. junr. 233; *Gale v. Gale*, 2 Cox, 153; *Hopkins v. Hopkins*, Ca. temp. Talb. 151.)

(7) Mr. Wooddeson (in his 25th Vin. Lect.) observes, "the principal *qualities* by which a vested, is distinguished from a contingent, remainder are, first, that the former is not liable to be defeated by the tenant for life's suffering a common recovery, or by *various other* means which may annihilate a contingent remainder. (See *post*, p. 171, and the note thereto.) This is the important difference. Secondly, a contingent remainder is not transferrible at law, except by fine or recovery. A remainder, contingent in its creation, may become afterwards vested, and entitled to the privileges of such durable and grantable interest."

longer contingent, but vested. Though, if A. had died before the contingency happened, that is, before B.'s son was born, the remainder would have been absolutely gone; for the particular estate was determined before the remainder could vest. Nay, by the strict rule of law, if A. were tenant for life, remainder to his own eldest son in tail, and A. died without issue born, but leaving his wife *enseint*, or big with child, and after his death a posthumous son was born, this son could not take the land, by virtue of this remainder; for the particular estate determined before there was any person *in esse*, in whom the remainder could vest (*t*). But, to remedy this hardship (8), it is enacted

(*t*) Salk. 228; 4 Mod. 282.

(8) The case of *Reeve v. Long* (1 Salk. 227,) which gave occasion to the statute mentioned in the text, was to the following purport:

John Long devised lands to his nephew, Henry, for life, remainder to his first and other sons in tail, remainder to his nephew, Richard, for life, &c. Henry died without issue born, but leaving his wife pregnant. Richard entered as in his remainder, and afterwards a posthumous son of Henry was born. The guardian of the infant entered upon Richard; and it was held by the Courts of Common Pleas and of King's Bench, that nothing vested in the posthumous son, because a contingent remainder must vest during the particular estate, or at the moment of its determination.

On an appeal to the House of Lords, this judgment was reversed, against the opinion of all the judges, who were much dissatisfied. (3 Lev. 408.) To set the question at rest, the statute was passed. Mr. Cruise, (2 Dig. 330,) however remarks, it is somewhat singular that this statute does not mention limitations or devises by will. But, he says, there is a tradition, that as the case of *Reeve v. Long*, arose upon a will, the Lords considered the law to have been settled by their determination in that case, and were

therefore unwilling to make any express mention of limitations made in wills, lest it should appear to call in question the authority, or propriety, of their determination. Besides, (he adds,) the words of the act may be construed, without much violence, to comprise settlements of estates made by wills, as well as by deeds.

Mr. Christian, in his note upon the passage in the text, considers the statute as a reproof given by the House of Commons to the Lords for their assumption: but, had it been so understood, the concurrence of the Lords would probably not have been obtained.

In the case of *Thelluson v. Woodford*, (4 Ves. 342,) Lord Rosslyn said, The case of *Reeve v. Long*, (certainly overruling *Archer's case*,) decided that a posthumous child was to be taken, to all intents and purposes, as born at the time the particular estate, on which his remainder depended, determined. Undoubtedly, the Court of Common Pleas, first, and upon a writ of error, the Court of King's Bench, had held differently. But it ought always to be remembered, it was the decision of Lord Somers; and that was not the only case in which he stood against the majority of the judges; and the better consideration

by statute 10 & 11 W. III. c. 16, that posthumous children shall be capable of taking in remainder, in the same manner as if they had been born in their father's lifetime: that is, the remainder is allowed to vest in them, while yet in their mother's womb (*u*).

This species of contingent remainders to a person not in being, must however be limited to some one, that may, by common possibility, or *potentia propinqua*, be *in esse* at or before the particular estate determines (*w*). As if an estate be *made to A. for life, remainder to the heirs of B.; now, if A. dies before B., the remainder is at an end; for during B.'s life he has no heir, *nemo est hæres viventis*: but if B. dies first, the remainder then immediately vests in his heir, who will be entitled to the land on the death of A. This is a good contingent remainder, for the possibility of B.'s dying before A. is *potentia propinqua*, and therefore allowed in law (*x*). But a remainder to the right heirs of B. (if there be no such person as B. *in esse*) is void (*y*). For here there must two contingencies happen: first, that such a person as B. shall be born; and, secondly, that he shall also die during the continuance of the particular estate; which make it *potentia remotissima*, a most improbable possibility. A remainder to a man's eldest son, who hath none (we have seen) is good, for by common possibility he may have one; but if it be limited in particular to his son

but must be to one, who, by common possibility, may be *in esse* at or before the determination of the particular estate.

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(*u*) See Vol. I. p. 130.

(*w*) 2 Rep. 51.

(*x*) Co. Litt. 378.

(*y*) Hob. 33.

of subsequent times has shown, his opinion deserved all the regard generally paid to it. The statute of William III. was not to affirm that decision. It did by implication affirm it, but it established that the same principle should govern the case, where the limitation was by deed of settlement. The manner in which the point has been treated ever since, in *Burdet v. Hopegood*, (1 P. Wms. 487,) and the other cases, (see 2 Ves. jun. 673; 11 Ves. 139; 2 Ves. & Bea. 367,) proves what the opinion has been upon the propriety of a rule, which it is impossible to say is attended with

real inconvenience, and which is according to every principle of justice and natural feeling.

A posthumous child, claiming under a remainder in a settlement, is entitled to the intermediate profits from the death of the father, as well as to the estate itself. (*Basset v. Basset*, 3 Atk. 203; *Thelluson v. Woodford*, 11 Ves. 139.) But a posthumous son, who succeeds by descent, can claim the rents and profits only from the time of his birth. (*Goodtitle v. Newman*, 3 Wils. 526; Co. Litt. 11 b, note 4. See Vol. I. p. 130, and the note thereto.)

John, or Richard, it is bad, if he have no son of that name; for it is too remote a possibility that he should not only have a son, but a son of a particular name (*z*). A limitation of a remainder, to a bastard before it is born, is not good (*a*) (9): for though the law allows the possibility of having bastards, it presumes it to be a very remote and improbable contingency. Thus may a remainder be contingent, on account of the uncertainty of the *person* who is to take it.

2. Where the *event* upon which it is to take effect is uncertain.

A remainder may also be contingent, where the person to whom it is limited is fixed and certain, but the *event* upon which it is to take effect is vague and uncertain. As,

(*z*) 5 Rep. 51.

(*a*) Cro. Eliz. 509.

(9) The several reports of the case to which our author refers as his authority for the passage in the text, are very discordant: and it rather appears that it was finally unnecessary to decide the question, whether a remainder to an unborn illegitimate child was necessarily invalid; as the claimant in *Blodwell v. Edwards*, (the case in question,) turned out to be actually born in lawful wedlock. (See Co. Litt. 3 b, and Mr. Hargrave's note 1.) However, Lord Parker, (afterwards Macclesfield,) in the case of *Metham v. The Duke of Devon*, (1 P. Wms. 530,) said, he *inclined* to think that a natural child *en ventre sa mere* could not take under a bequest in a will to all the natural children of a named man by a certain woman. And Sir W. Grant, M. R. in *Earle v. Wilson*, (17 Ves. 531,) said, whether the case referred to by Lord Coke, (which is also the case referred to by our author,) does, or does not, fully warrant the rule laid down by him, yet, his own great authority and the adoption of it by Lord Macclesfield, were sufficient to induce him to adhere to it, without nicely examining the reasons upon which it stands. The rule (he added) is in substance, that a bastard cannot take as the issue of a particular man, until it has acquired the re-

putation of being the child of that man, which cannot be before its birth. (*Bayley v. Snelham*, 1 Sim. & Stu. 81.) Yet, where a bequest is made to the natural child of which a particular woman is *enceinte*, without reference to any person as the father, there would be no uncertainty in that bequest, and probably it would be held good. But the rule of law does not acknowledge a natural child to have any father before its birth. By the later cases of *Gordon v. Gordon*, (1 Meriv. 153,) and *Evans v. Massey*, (8 Pr. 33,) it seems to be now established, that a prospective bequest to an illegitimate child, with which a woman is supposed to be *enceinte*, may be good, if the description of the object of bequest be not open to the uncertainty which must arise whenever it is made a condition precedent to the gift, that the child should actually be the child of a particular father, and when the description is in other respects so distinct as to leave no doubt as to the individual for whom the legacy is intended: though a contrary opinion, as intimated in the text, certainly appears to have been held formerly. (See *Wilkinson v. Adam*, 1 Ves. & Bea. 468; *Arnold v. Preston*, 18 Ves. 288.)

where land is given to A. for life, and in case B. survives him, then with remainder to B. in fee : here B. is a certain person, but the remainder to him is a contingent remainder, depending upon a dubious event, the uncertainty of his surviving A. During the joint lives of A. and B. it is contingent ; and if B. dies first, it never can vest in his heirs, but is for ever gone : but if A. dies first, the remainder to B. becomes vested.

*Contingent remainders of either kind, if they amount to [* 171] a freehold (10), cannot be limited on an estate for years, or any other particular estate, less than a freehold. Thus, if land be granted to A. for ten years, with remainder in fee to the right heirs of B., this remainder is void (*b*) ; but if granted to A. for life, with a like remainder, it is good. For, unless the freehold passes out of the grantor at the time when the remainder is created, such freehold remainder is void : it cannot pass out of him, without vesting somewhere ; and in the case of a contingent remainder it must vest in the particular tenant, else it can vest no where ; unless, therefore, the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him, and consequently the remainder is void.

Contingent remainders, if they amount to a freehold, cannot be limited on any estate less than freehold.

Contingent remainders may be *defeated*, by destroying or determining the particular estate upon which they depend (11), before the contingency happens whereby they become vested (*c*). Therefore, when there is tenant for life, with divers remainders in contingency, he may, not only by his death, but by alienation, surrender, or other methods, destroy and determine his own life-estate before any of those remainders vest (12), the consequence of which is, that he

They may be defeated by the determination of the particular estate before the contingency happens.

(*b*) 1 Rep. 130.

(*c*) 1 Rep. 66, 135.

(10) See *ante*, the note to p. 168.

(11) See *ante*, p. 168, with the notes thereto.

(12) It must be recollected, that an alienation by bargain and sale, or covenant to stand seised, will pass no further interest than the bargainor, or covenantor, can lawfully transfer. No estate is divested, and nothing but a *use* passes by these conveyances ; but no use can be greater than the estate

out of which it is created ; if a greater use is professed to be granted, the excess is merely void, and the statute executes the possession to so much only of the use as is lawfully granted. Therefore, if a tenant for life, with contingent remainders depending on his estate, conveys in fee, by bargain and sale, or covenant to stand seised in fee ; the bargainee or covenantee will only take an estate for life ; and

utterly defeats them all. As, if there be tenant for life, with remainder to his eldest son unborn in tail, and the tenant for

the contingent remainders will not be destroyed. (Gilb. on Uses and Trusts, Sugd. ed. p. 312.) Neither will a conveyance by lease and release, made by a tenant for life, bar the remainders over. (*Magennis v. MacCulloch*, Gilb. Eq. Rep. 236; Litt. sect. 600.) And a *cestui que trust* for life cannot, by any act of his, destroy a contingent remainder; because, whatever conveyance he makes, as he has no legal estate in him, his conveyance will only pass what he can lawfully grant. (*Lethieullier v. Tracy*, 3 Atk. 729; *Penhay v. Hurrell*, 2 Freem. 213.) Though, if tenant in tail of a trust estate suffered a recovery, while those fictitious assurances were allowed, the remainders over were destroyed. (*Penhay v. Hurrell*, *ubi supra*; *Boteler v. Allington*, 1 Br. 73.) And the simpler modes which, by the statute of 3 and 4 Gul. IV. c. 74, have been substituted for common recoveries, will have the same effect.

It has been said, that *any* alteration in the nature of the preceding estate, before a remainder vests, will destroy that remainder; (*Anonym.* 4 Leon. 237, pl. 363;) but Mr. Fearne is of opinion that the alteration, which will destroy a contingent remainder, must amount to an alteration in its quantity and not in its quality. (Essay on Conting. Rem. ch. 5, s. 14.) This conclusion Mr. Fearne held to be warranted by the adjudged cases of *Lane v. Pannel*, (1 Rolle's Rep. 238, 317, 438,) and of *Harrison v. Belsey*, (reported in T. Raym. 413; 1 Vent. 345; T. Jones, 136; 2 Show. 91; and Pollexf. 573.) Mr. Fearne ably argues that no necessary connexion exists between a remainder and the *quality* of the preceding estate. Whilst the particular estate continues the same in *quantity*, it continues to be the same estate as far as respects its relation to

a remainder. If a release, or severance between joint-tenants, determined the old estate, then a vested remainderman would be entitled to enter immediately, upon such release or severance: but, as the law is, that notwithstanding such release or severance, it continues to be the same estate as to a *vested* remainder, why (he asks) should it not be so as to a *contingent* remainder? No legal modification or alteration in the *circumstances only* of a particular estate, can be said to *determine* that estate: but the determination of the particular estate is the only point of connexion between such estate and the remainder; therefore, until that point is passed, there still remains the same place for a contingent remainder to take effect.

In *Shelly's case*, (1 Rep. 104,) a rule is stated, not as a matter then before the court for its determination, or even discussion, but incidentally introduced as an acknowledged rule of law, and, ever since, generally called the rule in *Shelly's case*. This rule is, that "when the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, always in such cases the words 'the heirs' are words of limitation of the estate, and not words of purchase." In other words, whenever the ancestor takes an estate of freehold, and a remainder is thereon limited in the same conveyance to his heirs, or heirs in tail, such remainder, (where there is no intermediate estate,) is immediately executed in possession in the ancestor; or (where there is an intervening estate) the remainder is vested in the ancestor, and is not contingent. Thus, an estate for life to A., with remainder to the heirs of his body, is not a contingent remainder to the heir

life, before any son is born, surrenders his life-estate, he by that means defeats the remainder in tail to his son : for his

of the body of A., but an immediate estate tail in A.

But, where the life estate, limited to the ancestor, is merely a trust estate, and that to his heirs carries the legal estate, they will not incorporate into an estate of inheritance in the ancestor, as they would had both been of one quality ; that is, both legal, or both equitable. (*Jones v. Lord Say and Seal*, 1 Eq. Ca. Ab. 383.) In order to unite and coalesce, the two estates, it seems settled, should also be created by the same instrument : (*Doe v. Fonnereau*, 2 Dougl. 490, 507 a :) however, a will, schedule, and codicil, if all published at the same time, with the same solemnities and attestation, will be considered as parts of the same instrument ; and two limitations therein contained, though on separate and distinct papers, may come within the operation of the rule in *Shelly's case* ; (*Hayes v. Foorde*, 2 W. Black. 700 ; and see 1 Bligh's P. R. 41 ;) or if a testator in his will expressly refers to any paper previously written, and so describes it that there can be no doubt of the identity, and the will is duly executed, that paper makes part of the will, whether executed or not. (*Habergham v. Vincent*, 2 Ves. junr. 228 ; *Smart v. Prujean*, 6 Ves. 565.) So, a power of appointment, when executed, is to be considered in the same light as if it had been inserted in the original deed by which the power of appointment was created. (*Venables v. Morris*, 7 T. R. 347.)

It follows from the doctrines above stated that, if, after giving an estate to a father for life, it is desired to secure a remainder to his children, care must be taken to limit such remainder by words of purchase ; as, to the first and other sons. However, courts of equity have gone far to aid the manifest in-

tention of the parties by giving their words a different construction from that which they technically and strictly bear. Thus, it has been determined, not only that the words "heir male" may be construed as words of purchase ; but the words "heirs of the body" have received the same construction. (*Hodgeson v. Bussey*, 2 Atk. 90 ; *Bagshaw v. Spencer*, 2 Atk. 580, where several earlier cases to the same effect are cited ; and see *Right v. Creber*, 5 Barn. & Cress. 871 ; *S. C.* 8 Dowl. & Ryl. 723.) But, the words "heir," or "heir male of the body," though in the singular number, are properly words of limitation, not of purchase ; unless words of limitation are superadded, and they are found in a will, where there is something in the context plainly showing that the testator did not mean to use the words in their technical sense. (*Blackburne v. Stables*, 2 Ves. & Bea. 371.) It is in order to give effect to the intention of a testator that the words "heir male" may, in a will, also be construed as *nomen collectivum*, including all the issue ; though in a deed no such construction would be allowable. (*Bayley v. Morris*, 4 Ves. 794.) But, it must be clearly understood, that, to enable any one to take as heir male by purchase, he must be both *heir* and *male*. (*Gwynne v. Hooke*, 1 Wils. 30 ; and see 1 Hovenden's Supp. to Vesey jun. 441.) The word issue is sometimes construed as a word of limitation, sometimes as a word of purchase ; according to the intent of the will, or deed, in which it is used. (*Roe v. Grew*, 2 Wils. 324 ; *S. C.* Wilm. Notes, 277 ; *King v. Burchell*, 1 Eden, 431 ; *Lyon v. Mitchell*, 1 Mad. 473.) In a deed, it is true, where the technical meaning of words is more attended to, the word "issue" is generally held to be a word of purchase. (*Bayley v. Mor-*

son not being *in esse*, when the particular estate determined, the remainder could not then vest; and, as it could not vest

ris, 4 Ves. 794.) In a deed of settlement on marriage, also, where the natural presumption is, that the object must have been to provide for unborn children, the word "issue," (if not confined by some indication of a contrary intention,) is a word of purchase including all descendants. (*Leigh v. Norbury*, 13 Ves. 344; *Hockley v. Mawbey*, 1 Ves. jun. 150; *Earl of Oxford v. Churchill*, 3 Ves. & Bea. 67.) The strong reason why, in such cases, the word "issue" must be construed a word of purchase is, that, if it were taken as a word of limitation, after a previous life estate secured to the father, he, by the merger of the two interests, might be enabled to defeat the whole intent of the settlement, and appropriate the settled estate to himself. (*Marshall v. Bousfield*, 2 Mad. 172.) On the other hand, if the object of the settlement, after giving a life-estate to unborn children, be to give a remainder to *their* issue, the word "issue" must, in subservience to that intention, be construed as a word of limitation: for, although this construction must, as we have just seen, put the issue in the power of their parents, (provided such parents live long enough after they are of age to dock the entail,) still, this is the nearest approach which can be made towards effecting the declared intention; for the rules of law do not permit that an estate for life shall be given to a person not *in esse*, with a remainder in tail to his issue as *purchasers*. (See the case last cited, and *Hampson v. Brandwood*, 1 Mad. 390; as also *infra*.) And in a will, it is usually most conformable to a testator's intent to hold the word "issue" to be a word of limitation; (*Lyon v. Mitchell*, 1 Mad. 473;) but as we have seen, it may be a word of purchase; and, when so used, it has been

said, it is *always* considered as synonymous with, and the same as, "descendants." (*Davenport v. Hanbury*, 3 Ves. 259.) This latter *dictum*, however, must be qualified; for though, according to all the cases, the word "issue," in a will, *usually* takes in descendants beyond immediate issue; still, a more restrained sense may be given to the word, if (upon fair reasoning, deduced from the whole contents, design, and tenor of the will,) it appears to have been used in that restricted sense: (*Sibley v. Perry*, 7 Ves. 531:) the testator may, in the introductory part of his will, have used the word "issue;" yet, by subsequent passages, he may have made it distinctly appear, that by "issue," he meant only *children*, and their children. (*Earl of Oxford v. Churchill*, 3 Ves. & Bea. 67; and see 1 Hoven-den's Supp. to Ves. jun. 54, 55.)

It is a general rule, that limitations to the "heirs of the body," in marriage articles, shall be carried into execution in equity by decreeing *strict* settlements, making the parents tenants for life; (*Honor v. Honor*, 1 P. Wms. 124; *Jones v. Langton*, 1 Eq. Ca. Ab. 392;) and not leaving it in their power to annul the substantial intent of the articles, by confining the performance to the mere letter: (*Streatfield v. Streatfield*, Ca. temp. Talb. 181; *Roberts v. Kingsly*, 1 Ves. sen. 239:) for, in equity, articles are considered as minutes only; and the Court of Chancery, where it finds the words short and defective, will presume what was the probable intent. (*Marquis of Blandford v. Duchess of Marlborough*, 2 Atk. 545; *Taggart v. Taggart*, 1 Sch. & Lef. 87.) Even when a marriage settlement has been executed, and does not rest in articles, the court, by virtue of the contract, may be enabled to deal with the set-

then, by the rules before laid down, it never can vest at all. In these cases therefore it is necessary to have trustees appointed to preserve the contingent remainders; in whom there is vested an estate in remainder for the life of the tenant for life, to commence when his estate determines. If therefore his estate for life determines otherwise than by his death, the estate of the trustees, for the residue of his natural life, will then take effect, and become a *particular estate in possession, sufficient to support the remainders depending in contingency. This method is said to have been

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tlement so as to effect the intention of the parties, and, with that view, to put upon technical words a sense, which, legally and strictly, would be inadmissible in other cases. (*Cholmondeley v. Clinton*, 2 Meriv. 347, citing *Seymour v. Boreman*, a note of which is to be found in Nels. 121.) And, it is quite clear, the operative part of a family settlement may be reformed, so as to accord with the intention declared in the recital. (*Doran v. Ross*, 1 Ves. jun. 57; *Payne v. Collier*, 1 Ves. jun. 171; *Hope v. Lord Clifden*, 6 Ves. 508; *Moore v. Magrath*, Cowp. 12; *Whalley v. Whalley*, 1 Meriv. 446.)

But the rule that marriage articles are to be carried into execution by a strict settlement, does not prevail, when the concurrence of *both* parents would, under the terms of the articles, be necessary to bar the entail. (*Highway v. Banner*, 1 Br. 587; *Howell v. Howell*, 2 Ves. sen. 359; *Brudenell v. Elwes*, 7 Ves. 390.)

It is to be recollected that, although a remainder after a life-estate given to the father of the party for whom the remainder is intended, may be limited by proper words of purchase, or by words which may be so construed; still, a remainder limited to a person unborn must be contingent, and therefore liable to be defeated by the destruction of the father's particular estate, if the remainder is dependent thereon: to prevent this, it

is necessary to interpose trustees, giving them an intermediate estate, to commence upon any determination of the father's life-estate by forfeiture or alienation, and to rest in them till the contingent estate comes into existence, or cannot possibly ever arise; and thus the trustees are said to support and preserve the contingent remainders. (See *ante*, p. 168, note.)

By a strict settlement, an estate may be rendered unalienable till the first son attains the age of twenty-one; at which time, if the father be dead, the son, as tenant in tail, will have full power over the estate: if the father be then living, he and the son can cut off all the subsequent limitations; or the son alone can bar his own issue, without the concurrence of the father. There is no method (as it has before been intimated) of securing an estate to the grand-children of a person who is without children at the time of the settlement. A settlor or testator may create as many vested remainders for life as he thinks fit; of such limitations the law has no abhorrence, as tending to a perpetuity: but, if a man wishes to go beyond this, and to transmit his estate in a course of descent; he must give an estate of inheritance, which will be alienable, at furthest, within twenty-one years after the determination of the vested remainders. (*Thelluson v. Woodford*, 4 Ves. 314.) See *post*, note 15, p. 174.

invented by Sir Orlando Bridgman, Sir Geoffrey Palmer, and other eminent counsel, who betook themselves to conveying during the time of the civil wars; in order thereby to secure in family settlements a provision for the future children of an intended marriage, who before were usually left at the mercy of the particular tenant for life (*d*): and when, after the restoration, those gentlemen came to fill the first offices of the law, they supported this invention within reasonable and proper bounds, and introduced it into general use.

Thus the student will observe how much nicety is required in creating and securing a remainder; and I trust he will in some measure see the general reasons upon which this nicety is founded. It were endless to attempt to enter upon the particular subtilties and refinements, into which this doctrine, by the variety of cases which have occurred in the course of many centuries, has been spun out and subdivided: neither are they consonant to the design of these elementary disquisitions. I must not however omit, that in devises by last will and testament, (which being often drawn up when the party is *inops consilii*, are always more favoured in construction than formal deeds, which are presumed to be made with great caution, forethought, and advice,) in these devises, I say, remainders may be created in some measure contrary to the rules before laid down: though our lawyers will not allow such dispositions to be strictly remainders; but call them by another name, that of *executory devises*, or devises hereafter to be executed.

Of executory
devises.

An executory devise of lands is such a disposition of them by will, that thereby no estate vests at the death of the devisor, but only on some future contingency (13). It differs

(*d*) See Moor. 486; 2 Roll. Abr. 797, pl. 12; 2 Sid. 159; 2 Chan. Rep. 170.

(13) Mr. Fearne, (in the commencement of the 1st chapter of his admirable treatise on Executory Devises,) observes, that the common definition of an executory devise, namely, that it is a devise of a future interest in lands, not to take effect at the testator's decease, but limited to arise and vest upon some future contingency, is too general: that it does, indeed,

comprehend every species of an executory devise, but is not confined to executory devises only; it includes every kind of contingent interest in lands given by devise: now every contingent interest in lands, limited by devise, is not an executory devise; for some contingent interests by devise are contingent remainders; therefore, the common definition must be

from a remainder in three very material points: 1. That it needs not any *particular estate to support it. 2. That by [* 173] it a fee-simple, or other less estate, may be limited after a fee-simple. 3. That by this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same.

1. The first case happens when a man devises a future estate to arise upon a contingency; and, till that contingency happens, does not dispose of the fee-simple, but leaves it to descend to his heir-at-law. As if one devises land to a feme-sole and her heirs, upon her day of marriage: here

1. An executory devise needs not any particular estate to support it.

considered as defective in point of precision. An executory devise is, strictly, such a limitation of a future estate in lands or chattels, (though, in the case of chattels *personal*, it is more properly an executory *bequest*,) as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law. It is only an indulgence allowed to a man's last will and testament, where otherwise the words of the will would be void; (*Driver v. Hoole*, 2 Wils. 90;) for, wherever a future interest is so limited by devise as to fall within the rules laid down for the limitation of contingent remainders, or it can take effect as a contingent remainder, it shall never take effect as an executory devise. (See *Purefoy v. Rogers*, 2 Saund. 388; *Doe v. Scudamore*, 2 Bos. & Pull. 295; *Doe v. Morgan*, 3 T. R. 765.) A proper executory devise is, where a testator devises a fee, but, upon the happening of a particular event, limits the inheritance over to another description of heirs: (*Luddington v. Kime*, 1 Lord Raym. 207; *Pells v. Brown*, Cro. Jac. 592.) Such a limitation over cannot take effect as a contingent remainder, because it is an established rule of law, that a fee cannot be limited after a fee. (*Gardner v. Sheldon*, Vaugh. 269; Co. Litt. 18 a; and see *ante*, p. 113.) But where the contingency, upon which the limita-

tion over after a fee is to take place, must happen within such time as that the estate *devised* would not be unalienable longer than an estate limited by way of remainder in a *deed* might legally be, such a limitation, by will, of a fee after a fee, is allowed to take effect under the name of an executory devise. (*Roe v. Jeffery*, 7 T. R. 596; *Doe v. Webber*, 1 Barn. & Ald. 721.)

There is another species of executory devises, where a testator gives a future estate to arise upon a contingency, or at a certain time; and does not in the mean time part with the fee, but retains it; and on his death the fee descends to his heir, until the time comes for the executory devise to take effect. (*Scatterwood v. Edge*, Salk. 230; *Hide v. Lyons*, 3 Leon. 70; *Gore v. Gore*, 2 P. Wms. 64; *S. C.* 2 Str. 958.)

A third sort of executory devises, or rather *bequests*, is where a *term* for years or other *personal* estate is bequeathed to one for life, remainder over to another: such limitations were very soon permitted to be created by *will*; the technical objections being obviated by changing the name from *remainders* to *executory bequests*; and at a later period such limitations were allowed to be made by deed. (*Matthew Manning's case*, 8 Rep. 189; *Wright v. Cartwright*, 1 Burr. 284.)

is in effect a contingent remainder, without any particular estate to support it; a freehold commencing *in futuro*. This limitation, though it would be void in a deed, yet is good in a will, by way of executory devise (*e*). For, since by a devise a freehold may pass without corporal tradition or livery of seisin, (as it must do if it passes at all,) therefore it may commence *in futuro*; because the principal reason why it cannot commence *in futuro* in other cases, is the necessity of actual seisin, which always operates *in præsenti*. And since it may thus commence *in futuro*, there is no need of a particular estate to support it; the only use of which is to make the remainder, by its unity with the particular estate, a present interest. And hence also it follows, that such an executory devise, not being a present interest, cannot be barred by a recovery, suffered before it commences (*f*) (14).

2. By it a fee, or other less estate, may be limited after a fee.

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2. By executory devise a fee, or other less estate, may be limited after a fee. And this happens where a deviser devises his whole estate in fee, but limits a remainder thereon to commence on a future contingency. As if a man devises land to A. and his heirs; but if he dies before the age of twenty-one, then to B. and his heirs: this remainder though void in a deed, is good by way of executory devise (*g*). But in both these species of executory devises, the contingencies ought to be such as may happen within a reasonable time; as within one or more life or lives in being, or within a moderate term of years, for courts of justice will not indulge even wills, so as to create a perpetuity, which the law abhors (*h*): because by perpetuities, (or the settlement of an interest, which shall go in the succession prescribed, without any power of alienation (*i*),) estates are made incapable

(*e*) 1 Sid. 153.

(*f*) Cro. Jac. 593.

(*g*) 2 Mod. 289.

(*h*) 12 Mod. 287; 1 Vern. 164.

(*i*) Salk. 229.

(14) This requires a little qualification. It was said in *Pells v. Brown*, (Cro. Jac. 593,) that if the person to whom the executory devise is limited comes in as vouchee in a common recovery, his possibility is given up, and his heir barred.

Since this note was first published,

common recoveries have been abolished, by stat. 3 & 4 Gul. IV. c. 74; but, if the executory devisee is a party to the instrument substituted, by virtue of that act, in the room of a recovery, it is presumed the effect will be the same as if he had come in as vouchee.

of answering those ends of social commerce, and providing for the sudden contingencies of private life, for which property was at first established. The utmost length that has been hitherto allowed for the contingency of an executory devise of either kind to happen in, is that of a life or lives in being, and one and twenty years afterwards. As when lands are devised to such unborn son of a feme-covert, as shall first attain the age of twenty-one, and his heirs; the utmost length of time that can happen before the estate can vest, is the life of the mother and the subsequent infancy of her son: and this hath been decreed to be a good executory devise (*k*) (15) (16).

(*k*) Fort. 232.

(15) The law does not allow such a limitation of property as would render it unalienable for a longer period than a life or lives in being, and twenty-one years afterwards, with the further allowance of a few months for the gestation of a child *en ventre sa mere*. It has been doubted whether an executory devise to a person unborn, can be limited to take effect upon a term *in gross*, of twenty-one years and a few months, after lives in being. Lord Alvanley (in the case of *Thelusson v. Woodford*, 4 Ves. 337,) said, the period of twenty-one years had never been considered as a term that might, at all events, be added to an executory devise, or trust. Mr. Sugden, (in a very able note to Gilbert on Uses and Trusts, ch. 2, s. 2,) contended that no such rule ought to prevail. But, in *Bengough v. Edridge*, (1 Simons, 267,) where trusts were to be performed after the expiration of a term *in gross* of twenty-one years from the decease of the survivor of twenty-eight persons who were living at the testator's decease; and where the contest was, whether the vesting could be suspended for lives in being and twenty-one years, not with reference to minority, but positively fixed time; Sir John Leach, V. C. considered it to be fully settled, that

limitations by way of devise, or springing use, may be made to depend upon an absolute term of twenty-one years after lives in being. Now, if an executory devise to a person unborn can be limited to take effect after the expiration of such a term *in gross*, there is a chance that the power of alienation may be restrained longer than it could in the case of a strict settlement. It is true, that, in a strict settlement, several successive infancies may occur, during which the estate would be unalienable; but, in this case the same thing may happen, and twenty-one years are moreover absolutely fixed, during which the estate cannot be aliened, even although the person presumptively entitled be adult.

The decision pronounced in the case of *Bengough v. Edridge* must, therefore, be taken to qualify the *dictum* of Lord Kenyon, in *Long v. Blackall*, (7 T. R. 102,) that an executory devise cannot make an estate unalienable for a longer time than is allowed by the limitations of a common law conveyance. And Sir John Leach's decision has been affirmed by the House of Lords. (See *Cadell v. Palmer*, 3 Moo. & S. 571; 10 Bingh. 141.)

(16) The 39 & 40 Geo. III. c. 98, enacts, that no person shall by any

3. By this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same.

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3. By executory devise a term of years may be given to one man for his life, and afterwards limited over in remainder to another, which could not be done by deed; for by law the first grant of it, to a man for life, was a total disposition of the whole term; a life estate being esteemed of a higher and larger nature than any term of years (*l*). And, at first, the courts were tender, even in the case of a will, of restraining the devisee for life from aliening the term; but only held, that in case he died without exerting that act of ownership, the remainder over should then take place (*m*): for the restraint of the power of alienation, especially in very long terms, was introducing a species of perpetuity. But, soon afterwards, it was held (*n*), that the devisee for life hath no power of aliening the term, so as to bar the remainder-man: yet, in order to prevent the danger of perpetuities, it was settled (*o*), that though such remainders may be limited to as many persons successively as the deviser thinks proper, yet they must all be **in esse* during the life of the first devisee, for then all the candles are lighted and are consuming together, and the ultimate remainder is in reality only to that remainder-man who happens to survive the rest: and it was also settled, that such remainder may not be limited to take effect, unless

(*l*) 8 Rep. 95.

(*m*) Bro. tit. Chattels, 23; Dyer, 74.

(*n*) Dyer, 358; 8 Rep. 96.

(*o*) 1 Sid. 451.

deed, will, or by any other mode, settle or dispose of any real or personal property, so that the rents and profits may be wholly or partially accumulated for a longer term than the life of the grantor, or the term of twenty-one years after the death of the grantor or the testator, or the minority of any person who shall be living, or *en ventre sa mere*, at the death of the grantor or the testator, or during the minority only of such person as would for the time being, if of full age, be entitled to the rents and produce so directed to be accumulated; and where any accumulation is directed otherwise,

such direction shall be void, and the rents and profits, during the time that the property is directed to be accumulated contrary to this act, shall go to such person as would have been entitled thereto, if no such accumulation had been directed; provided that this act shall not extend to any provision for the payment of debts, or for raising portions for children, or to any direction touching the produce of woods or timber.

A direction for accumulation during a life was held to be good for twenty-one years after the death of the testator. 9 Ves. jun. 127.—CH.

upon such contingency as must happen (if at all) during the life of the first devisee (*p*) (17).

(*p*) Skinn. 341; 3 P. Wms. 258.

(17) A limitation over of a term, or other personalty, in case the previous legatee shall die "without issue," is too remote; and the absolute interest in the property vests in the first taker. In some of the early cases, indeed, the judges inclined to hold those words to mean, without issue at the death of the party; but ever since the case of *Beauclerk v. Dormer*, (2 Atk. 309,) a different rule has prevailed; and it is now settled, that unless there are expressions or circumstances, from which it can be collected that the words were used in a more confined sense, they are to have their ordinary legal signification; viz. death without issue generally. (*Barlow v. Salter*, 17 Ves. 481; *Donn v. Penny*, 19 Ves. 547.) If a combined devise and bequest be made to a man and the heirs of his body, with a limitation over "if he has no such heirs," as these words do not point to any time less indefinite than a general failure of issue, the limitation over is void; and the first taker will have an absolute interest in the personal property. (*Jeffery v. Sprigge*, 1 Cox, 63.) But, where the limitation over of leasehold, or a term in real estate is, in case the first taker in tail dies "and leaves no such heirs," the settled construction is that it means *at his death*: (*Crooke v. De Vandes*, 9 Ves. 202, 204 :) and if, after a devise over of freehold estate in those terms, the testator makes a bequest over of his personalty, not combined with the devise over, but showing a plain intention to make the bequest dependent on the same event as the devise, the bequest over may be good, by way of executory bequest. (*Foley v. Irwin*, 2 Ball & Beat. 443.) Yet, the devise over would be void; for, it must be understood that the con-

struction of the words "*leaving issue*," as meaning *at the party's death*, is admitted only as to personal estate; the same words, when used with reference to freehold estate, are always held to import a general failure of issue. (*Franklyn v. Ley*, 6 Mad. 260.)

Words of limitation in a will, which, either directly or constructively, give an estate tail in freehold property, will pass an absolute estate in personalty: (*Britton v. Twining*, 3 Meriv. 183; *Elton v. Eason*, 19 Ves. 78 :) unless other words can be found in the will, which show that the testator meant to tie up his personalty as long as the rules of law allow. (*Chandless v. Price*, 3 Ves. 101.) A bequest over of leasehold, or other personal estate, in default of issue of the first taker *living at his death*, will clearly evince an intention not to give the absolute interest, and the bequest over will be valid, since it must take place (if at all) within the limits prescribed by the policy of the law, and there is no danger of a perpetuity being created. (*Donn v. Penny*, 19 Ves. 547; *Kirkpatrick v. Kirkpatrick*, 13 Ves. 484.) In such case, the legatees over may take *as purchasers*; but it will be vainly attempted to direct the succession to leasehold, or other personalty, so as to go concurrently with freehold. Neither leaseholds, nor any other descriptions of personal property, can be entailed so as to make them transmissible in a course of succession to heirs; they must go to personal representatives. (*Countess of Lincoln v. Duke of Newcastle*, 12 Ves. 225; *Keiley v. Fowler*, Wilmot's Notes, 310.) It is, no doubt, a sound general rule, to give the same meaning to the same words throughout a will: (*Goodright v. Dunham*, 1 Dougl. 267 ;

Thus much for such estates in expectancy, as are created by the express words of the parties themselves; the most intricate title in the law. There is yet another species, which is created by the act and operation of the law itself, and this is called a reversion.

III. Estates in reversion.—
The residue of the estate left in the grantor, which reverts to him on the determination of the estate granted by him.

III. An estate in *reversion* is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him (*q*). Sir Edward Coke (*r*) describes a reversion to be the returning of land to the grantor or his heirs after the grant is over. As, if there be a gift in tail, the reversion of the fee is, without any special reservation, vested in the donor by act of law: and so also the reversion, after an estate for life, years, or at will, continues in the lessor. For the fee-simple of all lands must abide somewhere; and if he, who was before possessed of the whole, carves out of it any smaller estate, and grants it away, whatever is not so granted remains in him. A reversion is never therefore created by deed or writing, but arises from construction of law; a remainder can never be limited, unless by either deed or devise. But both are equally transferable, when actually vested, being both estates *in præsenti* (18), though taking effect *in futuro*.

Of the origin and nature of reversions.

The doctrine of reversions is plainly derived from the feudal constitution (19). For, when a feud was granted to a man for life, or to him and his issue male rendering either rent or other services; then, on his death, or the failure of issue male, the feud was determined, and resulted back to

(*q*) Co. Litt. 22.

(*r*) 1 Inst. 142.

Doe v. Jesson, 5 Mau. & Sel. 69; *Haws v. Haws*, 3 Atk. 526; *Turner v. Moor*, 6 Ves. 559:) but the very same words may be differently construed, and have very different operations, when applied, in the same will, to different descriptions of property, governed by different rules: (*Forth v. Chapman*, 1 P. Wms. 667; *Elton v. Eason*, 19 Ves. 77:) thus, the same words which would give only an estate tail in freehold estate, will carry the absolute interest in leasehold: (*Green v. Stephens*, 19 Ves. 73; *Crooke v. De*

Vandes, 9 Ves. 203:) and see *supra*, another instance mentioned, in which the same words operate differently upon different descriptions of property.

(18) Although a person can only be said to be entitled to, not seised of, a reversion; yet reversions are vested interests, which may be aliened and charged much in the same manner as estates in possession. (*Wiscot's case*, 2 Rep. 61.)

(19) See *ante*, chap. 4, pp. 45, 56, with the notes thereto.

the *lord or proprietor, to be again disposed of at his pleasure. And hence the usual *incidents* to reversions are said to be *fealty* and *rent*. When no rent is reserved on the particular estate, fealty however results of course, as an incident quite inseparable, and may be demanded as a badge of tenure, or acknowledgment of superiority; being frequently the only evidence that the lands are holden at all. Where rent is reserved, it is also incident; though not inseparably so, to the reversion (*s*). The rent may be granted away, reserving the reversion; and the reversion may be granted away, reserving the rent; by *special* words: but by a *general* grant of the reversion, the rent will pass with it, as incident thereunto; though by the grant of the rent generally, the reversion will not pass. The incident passes by the grant of the principal, but not *e converso*: for the maxim of law is, "*accessorium non ducit, sed sequitur, suum principale*" (*t*).

These *incidental* rights of the reversioner, and the respective modes of descent, in which remainders very frequently differ from reversions, have occasioned the law to be careful in distinguishing the one from the other, however inaccurately the parties themselves may describe them. For if one, seised of a paternal estate in fee, makes a lease for life, with remainder to himself and his heirs, this is properly a mere reversion (*u*), to which rent and fealty shall be incident; and which shall only descend to the heirs of his father's blood, and not to his heirs general, as a remainder limited to him by a third person would have done (*w*): for it is the old estate, which was originally in him, and never yet was out of him. And so likewise, if a man grants a lease for life to A., reserving rent, with reversion to B. and his heirs, B. hath a remainder descendible to his heirs general, and not a reversion to which the rent is incident; but the grantor shall be entitled to the rent, during the continuance of A.'s estate (*x*).

What constitutes a reversion.

*In order to assist such persons as have any estate in remainder, reversion, or expectancy, after the death of others, against fraudulent concealments of their deaths, it is enacted by the statute 6 Ann. c. 18, that all persons on whose lives

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Protection of reversioners against the fraudulent concealment of the death of the *cestui que vie*.

(*s*) Co. Litt. 143.

(*t*) Ibid. 151, 152.

(*u*) Cro. Eliz. 321.

(*w*) 3 Lev. 407.

(*x*) 1 And. 23.

any lands or tenements are holden, shall (upon application to the Court of Chancery and order made thereupon,) once in every year, if required, be produced to the court, or its commissioners; or, upon neglect or refusal, they shall be taken to be actually dead, and the person entitled to such expectant estate may enter upon and hold the lands and tenements, till the party shall appear to be living.

Of the doctrine
of merger.

Before we conclude the doctrine of remainders and reversions, it may be proper to observe, that whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate (*y*), the less is immediately annihilated; or, in the law phrase, is said to be *merged* (20), that is, sunk or drowned in the greater. Thus

(*y*) 3 Lev. 437.

(20) Even if there be an intermediate *contingent* estate, it will be destroyed by the union and coalition of the greater estate and the less, (unless the greater estate is subjoined to the less by the same conveyance,) when such coalition takes place by the conveyance or act of the parties. (*Purefoy v. Rogers*, 2 Saund. 387.) But the reports of adjudged cases apparently differ with respect to the destruction of an intermediate contingent estate, in cases where the greater estate becomes united to the less by descent: these differences, however, may be reconciled, by distinguishing between those cases where the descent of the greater estate is immediate from the person by whose will the less estate, as well as the intermediate contingent estate, were limited; and the cases where the less estate and the contingent remainders were not created by the will of the ancestor from whom the greater estate immediately descends on the less estate. In the first set of cases, the descent of the greater estate does not merge and drown the intermediate contingent remainders; (*Boothley v. Vernon*, 9 Mod. 147; *Plunkett v. Holmes*, 1 Lev. 12; *Archer's case*, 1 Rep. 66;) in the second class of

cases, it does merge them. (*Hartpole v. Kent*, T. Jones, 77; *S. C.* 1 Ventr. 307; *Hooker v. Hooker*, Rep. temp. Hardw. 13; *Doe v. Scudamore*, 2 Bos. & Pull. 294; and see *Fearne*, p. 343, 6th ed., with Serjt. Williams's note to 2 Saund. 382 a.)

A distinction (as already has been intimated,) must be made between the cases where a particular estate is limited, with a contingent remainder over, and afterwards the inheritance is subjoined to the particular estate by the same conveyance; and those cases wherein the accession of the inheritance is by a conveyance, accident, or circumstance, distinct from that conveyance which created the particular estate. In the latter cases, we have seen, the contingent remainder is generally destroyed; in the former it is otherwise. For, where by the same conveyance a particular estate is first limited to a person, with a contingent remainder over to another, and with such a reversion or remainder to the first person as would, in its own nature, drown the particular estate first given him; this last limitation shall be considered as executed only *sub modo*; that is, upon such condition as to open and separate itself from the

if there be tenant for years, and the reversion in fee-simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more. But they must come to one and the same person in one and the same right; else, if the freehold be in his own right, and he has a term in right of another (*en auter droit*) there is no merger. Therefore, if tenant for years dies, and makes him who hath the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge; for he hath the fee in his own right, and the term of years in the right of the testator, and subject to his debts and legacies. So, also, if he who hath the reversion in fee marries the tenant for years, there is no merger; for he hath the inheritance in his own right, the lease in the right of his wife (*z*). An estate-tail is an exception to this rule; for a man may have in his own right both an estate-tail and a reversion in fee; and the estate-tail, though a less estate, shall not merge in the fee (*a*). For estates-tail are protected and preserved from merger by the *operation and construction, though not by the express words, of the statute *de donis*: which operation and construction have probably arisen upon this consideration; that, in the common cases of *merger* of estates for life or years by uniting with the inheritance, the particular tenant hath the sole interest in them, and hath full power at any time to defeat, destroy, or surrender them to him that hath the reversion; therefore, when such an estate unites with the reversion in fee, the law considers it in the light of a virtual surrender of the inferior estate (*b*). But, in an estate tail, the case is otherwise: the

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(*z*) Plow. 418; Cro. Jac. 275; Co. Litt. 338.

(*a*) 2 Rep. 61; 8 Rep. 74.

(*b*) Cro. Eliz. 302.

first estate, when the condition happens; and by no means to destroy the contingent estate. (*Lewis Bowles' case*, 11 Rep. 80; Fearne, 346, 6th ed.)

A court of equity will in some cases relieve against the merger of a term, and make it answer the purposes for which it was created. Thus, in *Powell v. Morgan*, (2 Vern. 90,) a portion was directed to be raised out of a term for

years, for the testator's daughter. The fee afterwards descended on her, and she, being under age, devised the portion. The Court of Chancery relieved against the merger of the term; and decreed the portion to go according to the will of the daughter. (See also, *Thomas v. Kemish*, 2 Freem. 208; *S. C.* 2 Vern. 352; *Saunders v. Bournford*, Finch, 424.)

tenant for a long time had no power at all over it, so as to bar or destroy it, and now can only do it by certain special modes, by a fine, a recovery, and the like (c): it would therefore have been strangely improvident to have permitted the tenant in tail, by purchasing the reversion in fee, to merge his particular estate, and defeat the inheritance of his issue; and hence it has become a maxim, that a tenancy in tail, which cannot be surrendered, cannot also be merged in the fee.

(c) See pag. 116.

CHAPTER XII.

OF ESTATES IN SEVERALTY, JOINT-TENANCY,
COPARCENARY, AND COMMON.

WE come now to treat of estates, with respect to the number and connexions of their owners, the tenants who occupy and hold them. And, considered in this view, estates of any quantity or length of duration, and whether they be in actual possession or expectancy, may be held in four different ways: in severalty, in joint-tenancy, in coparcenary, and in common.

Of the nature and properties of estates, with regard to the number and connexions of the tenants.

I. He that holds lands or tenements in *severalty*, or is sole tenant thereof, is he that holds them in his own right only, without any other person being joined or connected with him in point of interest, during his estate therein. This is the most common and usual way of holding an estate; and therefore we may make the same observations here, that we did upon estates in possession, as contradistinguished from those in expectancy, in the preceding chapter: that there is little or nothing peculiar to be remarked concerning it, since all estates are supposed to be of this sort, unless where they are expressly declared to be otherwise; and that in laying down general rules and doctrines, we usually apply them to such estates as are held in severalty. I shall therefore proceed to consider the other three species of estates, in which there are always a plurality of tenants.

I. Of estates in severalty.

*II. An estate in *joint-tenancy* is where lands or tenements are granted to two or more persons, to hold in fee-simple, fee-tail, for life, for years, or at will. In consequence of such grants an estate is called an estate in joint-

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II. Of estates in joint-tenancy.

tenancy (*a*), and sometimes an estate in *jointure*, which word, as well as the other, signifies an union or conjunction of interest; though in common speech the term *jointure* is now usually confined to that joint estate, which, by virtue of the statute 27 Hen. VIII. c. 10, is frequently vested in the husband and wife before marriage, as a full satisfaction and bar of the woman's dower (*b*).

In unfolding this title, and the two remaining ones, in the present chapter, we will first inquire, how these estates may be *created*; next, their *properties* and respective *incidents*; and lastly, how they may be *severed* or *destroyed*.

1. The creation of this estate depends on the wording of the instrument under which the tenant claims.

1. The *creation* of an estate in joint-tenancy, depends on the wording of the deed or devise, by which the tenants claim title: for this estate can only arise by purchase or grant, that is, by the act of the parties, and never by the mere act of law. Now, if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A. and B. and their heirs, this makes them immediately joint-tenants in fee of the lands. For the law interprets the grant so as to make all parts of it take effect, which can only be done by creating an equal estate in them both. As therefore the grantor has thus united their names, the law gives them a thorough union in all other respects. For,

2. Its properties are derived from—

2. The *properties* of a joint estate are derived from its unity, which is fourfold; the unity of *interest*, the unity of *title*, the unity of *time*, and the unity of *possession*; or, in other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.

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Unity of interest;

*First, they must have one and the same *interest* (1). One

(*a*) Litt. s. 277.

(*b*) See pag. 137.

(1) But, two persons may have an estate in joint-tenancy for their lives, and yet have several inheritances. (Litt. sect. 283, 284; 1 Inst. 184 a; *Cook v. Cook*, 2 Vern. 545; *Cray v. Willis*, 2 P. Wms. 530.) This is the case, where an estate is granted in joint-tenancy to persons and the heirs of their bodies, which persons cannot intermarry. (See *post*, p. 192.) But, in this case, there is no division between the estate for lives and the several inheritances, and the joint-tenants cannot convey away their respective *inheritances* so as to take effect immediately after their decease,

joint-tenant cannot be entitled to one period of duration or quantity of interest in lands, and the other to a different; one cannot be tenant for life, and the other for years; one cannot be tenant in fee, and the other in tail(c). But if land be limited to A. and B. for their lives, this makes them joint-tenants of the freehold; if to A. and B. and their heirs, it makes them joint-tenants of the inheritance(d). If land be granted to A. and B. for their lives, and to the heirs of A.; here A. and B. are joint-tenants of the freehold during their respective lives, and A. has the remainder of the fee in severalty (2): or if land be given to A. and B., and the heirs of the body of A.; here both have a joint estate for life, and A. hath a several remainder in tail(e). Secondly, joint-tenants must also have an unity of *title*: their estate must be created by one and the same act, whether legal or illegal; as by one and the same grant, or by one and the same dis-

(c) Co. Litt. 188.

(e) Litt. s. 285.

(d) Litt. s. 277.

and thus defeat the interests of the surviving joint-tenants; (see the next note;) the estate for lives and the inheritance are divided only in supposition and consideration of law, and though to some purposes the inheritance is executed, it is not as to all. (1 Inst. 182 b.)

(2) Lord Coke observes, "when land is given to two, and to the heirs of one of them, he in the remainder cannot grant away his fee-simple, as hath been said." (1 Inst. 184 b; and see the last note.) Mr. Hargrave, in his note upon this passage, remarks, that there is a seeming difficulty in it; but he conceives Lord Coke's meaning to be, that though for some purposes the estate for life of the joint-tenant having the fee, is distinct from, and unmerged in, his greater estate; yet, for granting, it is not so, but both estates are in that respect consolidated, notwithstanding the estate of the other joint-tenant: and therefore, that the fee cannot, in strictness of law, be granted as a remainder, *eo nomine*, and as an interest distinct

from the estate for life. (See the last note.) But, Lord Coke never meant that the joint-tenant, having the fee, could not in *any* form pass away the fee, subject to the estate of the other joint-tenant: that would be a doctrine not only contrary to the power of alienation, necessarily incident to a fee-simple, but would be inconsistent with Lord Coke's own statement in another part of his commentary. (See Co. Litt. 367 b.) The common law does not permit an estate, amounting to freehold, to be created to commence *in futuro*; (*ante*, p. 143;) and perhaps the true signification of the passage cited at the commencement of this note, may be illustrated by what the same great lawyer lays down in *Wiscot's case*, (2 Rep. 61 a,) namely, that when an estate is made to several persons, and to the heirs of one of them, he who hath the fee (expectant on the death of his joint-tenant,) cannot, (by a conveyance at common law,) grant over his remainder, *and continue in himself an estate for life*. (*Weedon v. Baldwin*, T. Raym. 40.)

unity of *time*;
and

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seisin (*f*). Joint-tenancy cannot arise by descent or act of law; but merely by purchase, or acquisition by the act of the party: and, unless that act be one and the same, the two tenants would have different titles; and if they had different titles, one might prove good and the other bad, which would absolutely destroy the jointure. Thirdly, there must also be an unity of *time*; their estates must be vested at one and the same period, as well as by one and the same title. As in case of a present estate made to A. and B.; or a remainder in fee to A. and B. after a particular estate; in either case A. and B. are joint-tenants of this present estate, or this vested remainder. But if, after a lease for life, the remainder be limited to the heirs of A. and B.; and during the continuance of the particular estate A. dies, which vests the remainder of one moiety in his heir: and then B. dies, whereby the other moiety becomes vested in the heir of B.: now A.'s heir and B.'s heir are not joint-tenants of this remainder, but tenants in common; for one moiety vested at one time, and the other moiety vested at another (*g*). *Yet where a feoffment was made to the use of a man, and such wife as he should afterwards marry, for term of their lives, and he afterwards married; in this case it seems to have been held that the husband and wife had a joint-estate, though vested at different times (*h*) (3): be-

(*f*) Litt. s. 278.

(*h*) Dyer, 340; 1 Rep. 101.

(*g*) Co. Litt. 188.

(3) The reason assigned in Gilbert's Treat. on Uses and Trusts, (p. 71 of the original work, or p. 134 of Mr. Sugden's greatly improved edition,) is as follows: "here the husband has no property in the land, neither *jus in re*, nor *ad rem*, but the feoffee has the whole property, at first to the use of the husband only, and upon the contingency of marriage to the use of them both entirely. And this is the only rule of equity to support the trust in the same manner the parties have limited it, and now it is executed by the statute in the same form as it was governed in equity." Mr. Sugden, in his note upon this passage, observes, that the point so laid down

was not established without difficulty, and that it seems questionable, whether the ground of decision was not that the use resulted to the feoffor till the marriage, and that upon the marriage the use declared arose, in which case the husband and wife took the use limited to them at the same time, and not at different periods. (*Mutton's case*, 2 Leon. 223.) Mr. Sugden adds, it is clear, at this day, that persons may take as joint-tenants, by way of use, although at different times. Thus, suppose in a marriage settlement an estate to be limited to the children of the marriage as joint-tenants in fee; on the birth of one child the whole vests in him; on the birth

cause the *use* of the wife's estate was in abeyance and dormant till the intermarriage; and, being then awakened, had relation back, and took effect from the original time of creation. Lastly, in joint-tenancy there must be an unity of ^{unity of possession.} *possession*. Joint-tenants are said to be seised *per my et per tout*, by the *half* or *moiety*, and by *all*: that is, they each of them have the entire possession, as well of every *parcel* as of the *whole* (*i*). They have not, one of them, a seisin of one half or moiety, and the other of the other moiety; neither can one be exclusively seised of one acre, and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety (*j*). And therefore, if an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common: for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety, *per tout, et non per my*: the consequence of which is, that neither the husband nor the wife can dispose of any part without the sent of the other, but the whole must remain to the survivor (*k*) (4).

(*i*) Litt. s. 288; 5 Rep. 10.

tr. 5, c. 26.

(*j*) *Quilibet totum tenet et nihil tenet; scilicet, totum in communi, et nihil separatim per se.* Bract. l. 5,

(*k*) Litt. s. 665; Co. Litt. 187; Bro. Abr. t. *Cui in vita*, 8; 2 Vern. 120; 2 Lev. 39.

of another, that child takes jointly with the former; and so on if there are twenty children. (*Stratton v. Best*, 2 Br. 240.)

And that it is a joint claim by the same conveyance which makes joint-tenants, not the time of vesting, has been held in various other cases. (See *Blamfordev. Blamforde*, 3 Bulstr. 101; *Earl of Sussex v. Temple*, 1 Lord Raym. 312; *Aylor v. Chep*, Cro. Jac. 259; *S. C. Yelv.* 183; *Oates v. Jackson*, 2 Str. 1172; *Hales v. Risley*, Pollexf. 373.)

So, although some of the persons to whom an estate is limited, are in by the common law, and others by the statute of uses, yet they will take in joint-tenancy: (*Watts v. Lee*, Noy,

124; *Sammes' case*, 13 Rep. 54:) and Lord Thurlow held, that whether a settlement was to be considered as a conveyance of a legal estate, or a deed to uses, would make no difference, and that in either case, the vesting at different times would not necessarily prevent the settled estate from being taken in joint-tenancy. (*Stratton v. Best*, 2 Br. 240.)

(4) A man purchased a copyhold estate, and took a surrender of it to himself, his wife, and his daughter, and their heirs. He afterwards, being visible owner of the estate, mortgaged it, and then died. The mortgagor brought his bill in equity against the mother and daughter, to discover their title, and to set aside their estates, as

Consequences of
and incidents
to the union of
interest and pos-
session.

Upon these principles, of a thorough and intimate union of interest and possession, depend many other consequences and incidents to the joint-tenant's estate. If two joint-tenants let a verbal lease of their land, reserving rent to be paid to one of them, it shall enure to both, in respect of the joint-reversion (*l*). If their lessee surrenders his lease to one of them, it shall also enure to both, because of the privity, or relation of their estate (*m*). On the same reason, livery of seisin, made to one joint-tenant, shall enure to both of them (*n*): and the entry, or re-entry, of one joint-tenant is as effectual in law as if it were the act of both (*o*) (5). In all actions also relating to their joint estate, one joint-tenant cannot sue or be sued without joining the other (*p*). But if two or more joint-tenants be seised of an advowson, and they present different clerks, the bishop may refuse to admit either: because neither joint-tenant hath a several right of patronage, but each is seised of *the whole; and if they do

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(*l*) Co. Litt. 214.

(*m*) Ibid. 192.

(*n*) Ibid. 49.

(*o*) Ibid. 319, 364.

(*p*) Ibid. 195.

fraudulent against the mortgagor, who was *pro tanto* a purchaser. The bill was dismissed, on the ground that the husband and wife took one moiety *by entireties*, so that the husband could not alien or dispose of it, to bind the wife, and the other moiety was well vested in the daughter. (*Back v. Andrews*, 2 Vern. 120; *S. C. Prec. in Cha.* 1; *Green v. King*, 2 W. Bla. 1214; *Doe v. Parratt*, 5 T. R. 654.) But, when a man and a woman, before their marriage, are joint-tenants, should they afterwards intermarry, they will still remain seised of their respective moieties, and the husband may sever the joint-tenancy and alien his moiety. (*Green v. King*, *ubi supra*; 1 Inst. 187 b; *Moody v. Moody*, Ambl. 650.)

“ If a joint-estate be made of land to husband and wife, and to a third person, in this case the husband and wife have in law, in their right, but the moiety; and the third person shall

have as much as the husband and wife, *viz.* the other moiety. And the cause is, for that the husband and wife are but one person in law. In the same manner it is where an estate is made to the husband and wife, and to two other persons: in this case the husband and wife have but the third part, and the other two persons the other two parts.” (Litt. sect. 291.)

(5) In ejectment the possession of one joint-tenant was formerly the possession of the other, so as to prevent the statute of limitations from running against him. (*Ford v. Lord Grey*, 6 Mod. 44; *S. C.* 1 Salk. 285.) But now, by the 12th section of the statute of 3 & 4 Gul. IV. c. 27, it is enacted that the possession of one coparcener, joint-tenant, or tenant in common, shall not be deemed the possession of the others, unless their shares of the profits of the land were received for their benefit by the party in possession.

not both agree within six months, the right of presentation shall lapse. But the ordinary may, if he pleases, admit a clerk presented by either, for the good of the church, that divine service may be regularly performed; which is no more than he otherwise would be entitled to do, in case their disagreement continued, so as to incur a lapse: and, if the clerk of one joint-tenant be so admitted, this shall keep up the title in both of them; in respect of the privity and union of their estate (*q*). Upon the same ground it is held, that one joint-tenant cannot have an action against another for trespass, in respect of his land (*r*); for each has an equal right to enter on any part of it. But one joint-tenant is not capable by himself to do any act, which may tend to defeat or injure the estate of the other (*6*); as to let leases, or to grant copyholds (*s*): and if any waste be done, which tends to the destruction of the inheritance, one joint-tenant may have an action of waste against the other, by construction of the statute Westm. 2, c. 22 (*t*). So too, though at common law no action of account lay for one joint-tenant against another, unless he had constituted him his bailiff or receiver (*u*), yet now by the statute 4 Ann. c. 16, joint-tenants may have actions of account against each

(*q*) Co. Litt. 185.

(*r*) 3 Leon. 262.

(*s*) 1 Leon. 234.

(*t*) 2 Inst. 403.

(*u*) Co. Litt. 200.

(6) In consequence of the right of survivorship among joint-tenants, all charges made by a joint-tenant on the estate determine by his death, and do not affect the survivor. For, it is a maxim of law, that *jus accrescendi præfertur oneribus*. (1 Inst. 185 a; Litt. sect. 286.) But, if the grantor of the charge survives, of course, it is good. (Co. Litt. 184 b.) So, if one joint-tenant suffers a judgment in an action of debt to be entered up against him, and dies before execution had, it will not be executed afterwards; but if execution be sued in the life of the cognizor, it will bind the survivor. (*Lord Abergavenny's case*, 6 Rep. 79; 1 Inst. 184 a.)

There is, however, one exception to the rule, that joint-tenants cannot charge the estate in any way, so as to affect the interests of the survivors: for instance, if there are two joint-tenants in fee, and one of them makes a lease for years to a stranger, it will be good against the survivor, even though such lease is not made to commence till after the death of the joint-tenant who executed it; because, the grant of a lease is a disposition of the land, made at the time of such grant, though possession is not then given. (Co. Litt. 185 a; Litt. s. 289; *Whitlock v. Horton*, Cro. Jac. 91; *Clerk v. Turner*, 2 Vern. 323.)

Of the *jus accrescendi*, or right of survivorship.

other, for receiving more than their due share of the profits of the tenements held in joint-tenancy (7).

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From the same principle also arises the remaining grand incident of joint-estates; *viz.* the doctrine of *survivorship*: by which, when two or more persons are seised of a joint-estate, of inheritance, for their own lives, or *pur auter vie*, or are jointly possessed of any chattel-interest, the entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it be, whether an inheritance, or a common freehold only, or even a less estate (*w*) (8). This is the natural and regular consequence of the union and entirety of their interest. The interest of two joint-tenants *is not only equal or similar, but also is one and the same. One has not originally a distinct moiety from the other; but, if by any subsequent act (as by alienation or forfeiture of either) the interest becomes separate and distinct, the joint-tenancy instantly ceases. But, while it continues, each of two joint-tenants has a concurrent interest in the whole; and therefore, on the death of his companion, the sole interest in the whole remains to the survivor. For the interest which the survivor originally had is clearly not divested by the death of his companion; and no other person can now claim to have a *joint* estate with him, for no one can now have an interest in the whole, accruing by the same title, and taking effect at the same time with his own; neither can any one claim a *separate* interest in any part of the tenements; for that would be to deprive

(*w*) Litt. s. 280, 281.

(7) Mr. Christian observes, "this action is now perhaps never brought; but the practice is to apply to a court of equity to compel an account; which is also the jurisdiction generally resorted to, in order to obtain a partition between joint-tenants, parcenors, and tenants in common. (Com. Dig. Chanc. 3 V. 6. & 4 E. Mitf. 109.)" [See Vol. III. p. 163, and the note thereto.—ED.]

(8) See the last note. Our author, however, will instruct us, in a subse-

quent part of this volume, (ch. 25, p. 399,) that, "for the encouragement of husbandry and trade, it is held, that stock on a farm, though occupied jointly, and also a stock used in a joint undertaking, by way of partnership in trade, shall always be considered as common, and not as joint property; and there shall be no survivorship therein." (See *Jackson v. Jackson*, 9 Ves. 596; and also *post*, p. 187, note.)

the survivor of the right which he has in all, and every part. As therefore the survivor's original interest in the whole still remains; and as no one can now be admitted, either jointly or severally, to any share with him therein; it follows, that his own interest must now be entire and several, and that he shall alone be entitled to the whole estate (whatever it be) that was created by the original grant.

This right of survivorship is called by our ancient authors (*x*) the *jus accrescendi*, because the right upon the death of one joint-tenant accumulates and increases to the survivors: or, as they themselves express it, "*pars illa communis accrescit superstitibus, de persona in personam, usque ad ultimam superstitem.*" And this *jus accrescendi* ought to be mutual; which I apprehend to be one reason why neither the king (*y*), nor any corporation (*z*), can be a joint-tenant with a private person. For here is no mutuality (9): the private person has not even the remotest chance of being seised of the entirety, by benefit of survivorship; for the king and the corporation can never die.

This right must be mutual.

* 3. We are, lastly, to inquire how an estate in joint-tenancy may be *severed* and *destroyed*. And this may be done by destroying any of its constituent unities. 1. That of *time*, which respects only the original commencement of the joint-estate, cannot indeed (being now past) be affected by any subsequent transactions. But, 2. The joint-tenants' estate may be destroyed, without any alienation, by merely disuniting their *possession*. For joint-tenants being seised *per my et per tout*, every thing that tends to narrow that interest, so that they shall not be seised throughout the whole and throughout every part, is a severance or destruction of the jointure. And therefore, if two joint-tenants agree to part their lands, and hold them in severalty, they are no longer joint-tenants: for they have now no joint-interest in

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3. The modes by which a joint-tenancy may be severed or destroyed.

(*x*) Bracton, l. 4, tr. 3, c. 9, s. 3; Fleta, l. 3, c. 4.

(*y*) Co. Litt. 190; Finch, L. 83.

(*z*) 2 Lev. 12.

(9) Lord Coke (in 1 Instit. 181 b) says, there may be joint-tenancy without equal benefit of survivorship on both sides. As, "if a man letteth lands to A. and B. during the life of A., if B. dieth, A. shall have all by

the survivor, but if A. dieth, B. shall have nothing." And again (in 1 Instit. 193 a) he puts, more doubtfully, another case, in which the benefit of survivorship would not be the same to both joint-tenants.

the whole, but only a several interest respectively in the several parts. And for that reason also, the right of survivorship is by such separation destroyed (*a*). By common law all the joint-tenants might agree to make partition of the lands, but one of them could not compel the other so to do (*b*): for this being an estate originally created by the act and agreement of the parties, the law would not permit any one or more of them to destroy the united possession without a similar universal consent. But now, by the statutes 31 Hen. VIII. c. 1, and 32 Hen. VIII. c. 32, joint-tenants, either of inheritances or other less estates, are compellable by writ of partition to divide their land (*c*) (10). The join-

(*a*) Co. Litt. 188, 193.

(*b*) Litt. s. 290.

(*c*) Thus by the civil law, *nemo in-vitus compellitur ad communionem*. (Ff. 12, 6, 26, s. 4.) And again;

si non omnes qui rem communem habent, sed certi ex his, dividere desiderant; hoc judicium inter eos accipi potest. (Ff. 10, 3, 8.)

(10) A party desirous of a partition, until the statute of 3 & 4 Gul. IV. c. 27, abolished writs of partition, had the law open to him; there is no original equity for it; but the equitable jurisdiction obtained firm establishment, upon principles of convenience. (*Calmady v. Calmady*, 2 Ves. jun. 570; *Mundy v. Mundy*, 2 Ves. jun. 124.)

The Courts of Chancery and of Exchequer issue commissions for making partition, not under the authority of any act of Parliament, but on account of the extreme difficulty which attended the process at law; where the plaintiff was bound to prove his title as he *declared*, and also the titles of the defendants. That was attended with so much embarrassment, that, by analogy to the jurisdiction of equity in cases of dower, a partition may be obtained upon bill. The plaintiff must, however, state upon the record his own title; and the titles of the defendants, as well as he is able: and the Court will aid this statement by directing an inquiry to ascertain who are, together with him, entitled to the whole subject of partition. (*Agar v. Fairfax*, 17 Ves. 553.) It is evident

that, where the interest is much divided, this is a much more convenient proceeding than the course pursued in a court of law. (*Baring v. Nash*, 1 Ves. & Bea. 555.) And the jurisdiction is now so confirmed by usage, that a commission is considered due, in all cases where the writ would have lain: (*Turner v. Morgan*, 8 Ves. 145; *Manaton v. Squire*, 2 Freem. 26 :) and not only so, but it has been declared there is no doubt equity may interfere, in cases where a writ of partition would not lie at common law. (*Swan v. Swan*, 8 Pr. 519.) An additional reason, frequently, for proceeding by bill, rather than by writ, was this:—under a writ of partition, that specific relief alone could be had; but under a commission the account between the parties, with respect to the rents and profits of the estate, may be decreed at the same time. (*Lorimer v. Lorimer* 5 Mad. 363.) The proceeding by writ was advisable only in cases where some of the parties, having title, were labouring under incapacities to do legal acts: for, partition in equity is completed by conveyances, to be executed by the parties; and the partition can-

ture may be destroyed by destroying the unity of *title*. As

not be effectually had, if the parties be not competent to execute the conveyances: (*Whaley v. Dawson*, 2 Sch. & Lef. 372; *Lord Brook v. Lord and Lady Hertford*, 2 P. Wms. 518;) for this reason, it is necessary to have the legal title before the Court; (*Miller v. Warmington*, 1 Jac. & Walk. 493;) and, although an infant may be either plaintiff or defendant in a suit for partition, yet, in such a case, the conveyances of *all* parties must be respited till the infant comes of age. (*Tuckfield v. Buller*, 1 Dick. 243.) But, the form of completing a partition at law is essentially different;—there it is effected by the judgment of the Court, and the delivering up possession in pursuance thereof; which concludes all the parties to the judgment. (*Whaley v. Dawson*, 2 Sch. & Lef. 372.)

In the progress of a suit for partition, it is the practice of the Court of Exchequer, on the return of the certificate of the commissioners, to set the cause down for further directions. (*Dean and Chapter of Hereford v. Hullett*, 6 Pr. 332.) In the case just cited, it was intimated to be the course of the Court of Chancery, to require an order *nisi* for the confirmation of the certificate to be moved for, before the cause was set down for further directions; in order that any party aggrieved might have an opportunity of *taking exceptions*. In point of fact, however, the practice of the Court of Chancery is not, as was assumed, to examine the correctness of the commissioners' return upon exceptions, but, on motion made, to suppress such return. (*Jones v. Totty*, 1 Sim. 136; *Corbet v. Davenant*, 2 Br. 252.)

It has been said, *obiter*, that partition can only be decreed between joint-tenants, tenants in common, or co-partners; (*Miller v. Warmington*, 1 Jac. & Walk. 493; and see *post*, chap.

20, p. 323;) but, under certain circumstances, the jurisdiction has, for a length of time, been exercised upon bills for dower: and the inconvenience of a temporary partition will not sustain a demurrer to a bill brought by a plaintiff having a quantity of interest which would entitle him to the writ. (*Baring v. Nash*, 1 Ves. & Bea. 555.) That the writ is demandable between tenants for life, or for years, appears expressly from the stat. 32 Hen. VIII. c. 32; and partition may be enforced by such parties, as between themselves, although the owner of the inheritance does not choose, and cannot, at the instance of the termors, be compelled, to join in the object of the suit. (*Baring v. Nash*, *ubi supra*.) Upon similar principle, it is no objection to a partition, that parties may subsequently come *in esse*, who will be entitled to a share, in which event the whole process will have to be commenced over again. (*Wills v. Slade*, 6 Ves. 498.) And difficulty, or inconvenience, or the minuteness of a party's interest, cannot in any case prevail as an objection to a commission for the purpose of making partition. (*Parker v. Gerard*, Ambl. 236; *Turner v. Morgan*, 8 Ves. 145, and 11 Ves. 157, n; *Warner v. Baynes*, Ambl. 589.) A bill will lie for partition of tithes; (*Baxter v. Knollys*, 1 Ves. sen. 495;) or of an advowson. (*Matthews v. Bishop of Bath and Wells*, 2 Dick. 652; *Bodicoate v. Steers*, 1 Dick. 69.) And joint-tenants of an equity of redemption may have a partition, as between themselves, to which the mortgagee will not be a necessary party. (*Swan v. Swan*, 8 Price, 519.)

A mere partition is no revocation of a previous devise by a tenant in common, because *partition* is an incident adherent to his estate, and the title

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if one joint-tenant aliens and conveys (11) his estate to a third person: here the joint-tenancy is severed, and turned into tenancy in common(*d*); for the grantee and the remaining joint-tenant hold by different titles, (one derived from the original, the other from the subsequent, grantor,) though, till partition made, the unity of possession continues. But a devise of one's share by will *is no severance of the jointure (12): for no testament takes effect till after the death of the testator, and by such death the right of the survivor (which accrued at the original creation of the estate, and

(*d*) Litt. s. 292.

remains the same. (*Attorney General v. Vigor*, 8 Ves. 281.) But, any *qualified* conveyance of the legal fee, or the slightest addition to the mere object of partition, would operate as a revocation. (*Brydges v. Duchess of Chandos*, 2 Ves. jun. 429; *Ward v. Moore*, 4 Mad. 372; *Knollys v. Alcock*, 7 Ves. 564; *Rawlins v. Burgess*, 2 Ves. & Bea. 387; *Maundrell v. Maundrell*, 10 Ves. 249.)

In the report of *Ward v. Moore*, (4 Mad. 372,) it seems to be intimated, that a joint-tenant may devise his estate before partition, and that the partition will not revoke the devise. This, however, could hardly have been meant. In the case of *Swift v. Roberts*, (3 Burr. 1496, and Ambl. 618,) it was held clear, that although subsequent events may affect the *operation* of a will, the party must have a devising *power* at the time of making the will, or it cannot be made valid by matter *ex post facto*. Now, a joint-tenant, whilst he continues such, clearly has not a devisable estate; (*Doe v. Tomkinson*, 2 Mau. & Sel. 166;) and after partition he acquires a several estate, attended with different qualities, as to the actions and remedies which may be had by or against him in respect thereof, from those belonging to or affecting the estate in joint-tenancy. A republication of the will, indeed,

after the partition, would give it validity; for the will, in such case, will be considered as if originally made at the date of republication, when the devising power of the party could not be questioned.

The costs of issuing, executing, and confirming, a commission of partition, must be borne by the parties in proportion to the value of their respective interests; (*Agar v. Fairfax*, 17 Ves. 558;) but no costs are given up to the hearing of the bill; (*Baring v. Nash*, 1 Ves. & Bea. 554;) for there would be no equity in saddling one party with any portion of the charges in respect of previous collateral questions raised by the other. (*Whaley v. Dawson*, 2 Sch. & Lef. 371.)

Great part of this note is extracted from Hovenden's Supplem. to Ves. jun. Vol. i. p. 236.

(11) A covenant by a joint-tenant to sell, though it does not sever the joint-tenancy at law, will do so in equity; (*Browne v. Raindle*, 3 Ves. 257; *Hinton v. Hinton*, 2 Ves. sen. 639;) provided the agreement for sale be one of which a specific performance could be enforced. (*Partriche v. Powlett*, 2 Atk. 54; *Hinton v. Hinton*, 2 Ves. sen. 634.)

(12) See *ante*, the last note but one.

has therefore a priority to the other (*e*)) is already vested (*f*).
 4. It may also be destroyed by destroying the unity of *interest*. And therefore, if there be two joint-tenants for life, and the inheritance is purchased by or descends upon either, it is a severance of the jointure (*g*); though, if an estate is originally limited to two for life, and after to the heirs of one of them, the freehold shall remain in jointure, without merging in the inheritance; because, being created by one and the same conveyance, they are not separate estates (which is requisite in order to a merger), but branches of one entire estate (*h*). In like manner, if a joint-tenant in fee makes a lease for life of his share, this defeats the jointure (*i*) (13): for it destroys the unity both of title and of interest. And whenever or by whatever means the jointure ceases or is severed, the right of survivorship or *jus accrescendi* the same instant ceases with it (*k*). Yet, if one of three joint-tenants alienes his share, the two remaining tenants still hold their parts by joint-tenancy and survivorship (*l*): and, if one of three joint-tenants releases his share to one of his companions, though the joint-tenancy is destroyed with regard to that part, yet the two remaining parts are still held in jointure (*m*); for they still preserve their original constituent unities. But when, by any act or event, different interests are created in the several parts of the estate, or they are held by different titles, or if merely the possession is separated; so that the tenants have no longer these four indispensable properties, a sameness of

(*e*) *Jus accrescendi præfertur ultimæ voluntati.* Co. Litt. 185.

(*f*) Litt. s. 287.

(*g*) Cro. Eliz. 470.

(*h*) 2 Rep. 60; Co. Litt. 182.

(*i*) Litt. s. 302, 303.

(*k*) *Nihil de re accrescit ei, qui nihil in re quando jus accresceret habet.* Co. Litt. 188.

(*l*) Litt. s. 294.

(*m*) Litt. s. 304.

(13) In the case of *Gale v. Gale*, (2 Cox, 155,) Chief Baron Macdonald said, "there are instances to be found, where an estate that has been severed may be reunited; as in the case put in Co. Litt. (193 a,) of there being two joint-tenants *in fee*, and one leasing for the term of the lessee's life, which lessee dies in the life-time of both the

joint-tenants. Here certainly is a severance by the lease; but if the lessee dies in the life-time of both the joint-tenants, the estate re-unites." And in Mr. Preston's edition of Watkins' Princip. of Convey. (p. 84,) it is said, that a grant for life, or in tail, by a joint-tenant in fee, only suspends the joint-tenancy.

interest, and undivided possession, a title vesting at one and the same time, and by one and the same act or grant; the jointure is instantly dissolved.

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The consequences of dissolving the joint estate.

*In general, it is advantageous for the joint-tenants to dissolve the jointure (14): since thereby the right of survivorship is taken away, and each may transmit his own part to his own heirs. Sometimes however it is disadvantageous to dissolve the joint-estate (15): as if there be joint-tenants

(14) And the leaning of courts, in modern times, is in favour of tenancy in common, rather than joint-tenancy, where that question is open to construction. (*Rigden v. Vallier*, 2 Ves. sen. 258; see *post*, p. 193.) Thus, when a purchase agreement has been entered into by two purchasers, in terms *primâ facie* joint, but there are circumstances from which it can be collected, that a joint-tenancy was not in contemplation; a court of equity will not execute the agreement by directing a conveyance in joint-tenancy; the intention, however, to make the purchase as tenants in common will not be assumed as of necessity. (*Aveling v. Knipe*, 19 Ves. 444.)

If two persons advance money on a mortgage, though the mortgage deed may be joint, yet the interest will not be subject to survivorship, when it clearly appears the intention of the lenders was, that each should receive his own money again. (*Petty v. Styward*, 1 Cha. Rep. 58; and see *ante*, note, p. 183.)

But, where a devise, or bequest, is made in terms creating a joint-tenancy, without any other words or circumstances which, either expressly or by implication, create a severance; there, no room is left for construction, and the devisees, or legatees, must take as joint-tenants. (*Whitmore v. Trelawney*, 6 Ves. 134; *Morley v. Bird*, 3 Ves. 631; *Davenport v. Hanbury*, 3 Ves. 260; *Perry v. Woods*, 3 Ves. 206; *Swaine v. Burton*, 15 Ves. 371; *Crooke v. De Vandes*, 9 Ves. 204.)

On the other hand, when a will contains words importing the testator's intention, that the interests he has devised shall be taken by the objects of his bounty as tenants in common; but, in the same will, he has used other words, which, in their ordinary construction, would be inconsistent with that intention; those inconsistent words will, if possible, be moulded so as not to destroy the effect of the words importing a tenancy in common.

Great doubts have been entertained by judges, both at law and in equity, as to words creating a joint-tenancy, or a tenancy in common; (*Fisher v. Wigg*, 1 P. Wms. 14;) but it is settled, that in equity, at all events, the words "equally to be divided, equally, among, between, respectively, share and share alike," create a tenancy in common. (*Perry v. Woods*, 3 Ves. 206; *Morley v. Bird*, 3 Ves. 631; *Jenour v. Jenour*, 10 Ves. 569; *Lashbrook v. Cock*, 2 Meriv. 70; *Rigden v. Vallier*, 2 Ves. sen. 256; *Heathe v. Heathe*, 2 Atk. 122; *Denn v. Gaskin*, Cowp. 660. And see *post*, p. 193.)

(15) So, there are cases in which a joint form of gift may be the only, or at any rate the best, mode of causing a bequest to go in the course intended by the testator; as, for instance, where a bequest is made to infant *natural* children, who, in the event of the death of any, could not succeed to each other. (*Stuart v. Bruce*, 3 Ves. 363.)

for life, and they make partition, this dissolves the jointure; and, though before they each of them had an estate in the whole for their own lives and the life of their companion, now they have an estate in a moiety only for their own lives merely; and, on the death of either, the reversioner shall enter on his moiety (*n*). And therefore, if there be two joint-tenants for life, and one grants away his part for the life of his companion, it is a forfeiture (*o*): for, in the first place, by the severance of the jointure he has given himself in his own moiety only an estate for his own life; and then he grants the same land for the life of another; which grant by a tenant for his own life merely, is a forfeiture of his estate (*p*): for it is creating an estate which may by possibility last longer than that which he is legally entitled to.

III. An estate held in *coparcenary* is where lands of inheritance descend from the ancestor to two or more persons. It *arises* either by common law or particular custom. By common law: as where a person seised in fee-simple, or in fee-tail dies, and his next heirs are two or more females, his daughters, sisters, aunts, cousins, or their representatives; in this case they shall all inherit, as will be more fully shown, when we treat of descents hereafter; and these co-heirs are then called *coparceners*; or, for brevity, *parceners* only (*q*). Parceners by particular custom are where lands descend, as in gavelkind, to all the males in equal degree, as sons, brothers, uncles, &c. (*r*). And, in either of these cases, all the parceners put together make but one heir; and have but one estate among them (*s*).

III. Of estates in coparcenary.

*The *properties* of parceners are in some respects like those of joint-tenants; they having the same unities of *interest, title, and possession*. They may sue and be sued jointly for matters relating to their own lands (*t*); and the entry of one of them shall in some cases enure as the entry of them all (*u*) (16). They cannot have an action of trespass against

Of the nature and properties of these estates.

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(*n*) 1 Jones, 55.

(*o*) 4 Leon. 237.

(*p*) Co. Litt. 252.

(*q*) Litt. s. 241, 242.

(*r*) Ibid. s. 265.

(*s*) Co. Litt. 163.

(*t*) Ibid. 164.

(*u*) Ibid. 188, 243.

(16) According to the old law, accounted in law the entry of both, "When one coparcener entered *generally*, and took the profits, this was the sister." (1 Instit. 243 b.)

each other: but herein they differ from joint-tenants, that they are also excluded from maintaining an action of waste (*w*); for coparceners could at all times put a stop to any waste by writ of partition, but till the statute of Henry the eighth joint-tenants had no such power. Parceners also differ materially from joint-tenants in four other points: 1. They always claim by descent, whereas joint-tenants always claim by purchase. Therefore, if two sisters purchase lands, to hold to them and their heirs, they are not parceners, but joint-tenants (*x*): and hence it likewise follows, that no lands can be held in coparcenary, but estates of inheritance, which are of a descendible nature; whereas not only estates in fee and in tail, but for life or years, may be held in joint-tenancy. 2. There is no unity of *time* necessary to an estate in coparcenary. For if a man hath two daughters, to whom his estate descends in coparcenary, and one dies before the other; the surviving daughter and the heir of the other, or when both are dead, their two heirs, are still parceners (*y*); the estates vesting in each of them at different times, though it be the same quantity of interest, and held by the same title. 3. Parceners, though they have an *unity*, have not an *entirety* of interest. They are properly entitled each to the whole of a distinct moiety (*z*); and of course there is no *jus accrescendi*, or survivorship, between them: for each part descends severally to their respective heirs, though the unity of possession continues. And as long as the lands continue in a course of descent, and united in possession, so long are the tenants therein, whether male or female, called parceners. But if *the possession be once severed by partition, they are no longer parceners, but tenants in severalty; or if one parcener alienes her share, though no partition be made, then are the lands no longer held in *coparcenary*, but in *common* (*a*).

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(*w*) 2 Inst. 403.(*x*) Litt. s. 254.(*y*) Co. Litt. 164, 174.(*z*) Ibid. 163, 164.(*a*) Litt. s. 309.

Though Lord Coke, in the same place, says, "when one coparcener doth *especially* enter, claiming the whole land, and taking the whole profits, she gains the moiety of her sister by abatement, though her dying seised

shall not take away the entry of her sister." But the law in this last respect has been altered; see *ante*, the note to p. 182, and *post*, the note to p. 194.

Parceners are so called, saith Littleton (*b*), because they may be constrained to make *partition*. And he mentions many methods of making it (*c*); four of which are by consent, and one by compulsion. The first is, where they agree to divide the lands into equal parts in severalty, and that each shall have such a determinate part. The second is, when they agree to choose some friend to make partition for them, and then the sisters shall choose each of them her part according to seniority of age; or otherwise, as shall be agreed. The privilege of seniority is in this case personal; for if the eldest sister be dead, her issue shall not choose first, but the next sister. But, if an advowson descend in coparcenary, and the sisters cannot agree in the presentation, the eldest and her issue, nay her husband, or her assigns, shall present alone, before the younger (*d*) (17). And the reason given is, that the former privilege of priority in choice upon a division, arises from an act of her own, the agreement to make partition; and therefore is merely personal: the latter, of presenting to the living, arises from the act of the law, and is annexed not only to her person, but to her estate also. A third method of partition is, where the eldest divides, and then she shall choose last; for the rule of law is, *cujus est divisio, alterius est electio*. The fourth method is, where the sisters agree to cast lots for their shares. And these are the methods by consent. That by compulsion is, where one or more sue out a writ (18) of partition against the others; whereupon the sheriff shall go to the lands, and make partition thereof by the verdict of a jury there impaneled, and, assign to each of the parceners her part in severalty (*e*). But there are some things *which [* 190]

Of the methods of making partition of estates held in coparcenary.

(*b*) s. 241.

(*c*) s. 243 to 264.

(*d*) Co. Litt. 166; 3 Rep. 22.

(*e*) By statute 8 & 9 W. III. c. 31,

an easier method of carrying on the proceedings on a writ of partition, of lands held either in joint-tenancy, parcenary, or common, than was used at

(17) Mr. Christian observes, that "it has been doubted whether the grantee of the eldest sister shall have the first and sole presentation after death. Harg. Co. Litt. 166. But it was expressly determined in favour of such a grantee in 1 Ves. 340." [See a summary of this subject stated

in chap. 30, dial. 2, of the Doctor and Student.—ED.]

(18) See *ante*, p. 185, note, that the proceeding by *writ* is now almost entirely superseded by the more convenient process of a *commission* out of a court of equity.

are in their nature impartible (19). The mansion-house, common of estovers, common of piscary uncertain, or any other common without stint, shall not be divided; but the eldest sister, if she pleases, shall have them, and make the others a reasonable satisfaction in other parts of the inheritance: or, if that cannot be, then they shall have the profits of the thing by turns, in the same manner as they take the advowson (*f*).

Where one of the daughters has an estate given with her in *frankmarriage*, by the same ancestor from whom the lands descend to her and her sisters in coparcenary.

There is yet another consideration attending the estate in coparcenary: that if one of the daughters has had an estate given with her in *frankmarriage* by her ancestor, (which we may remember was a species of estates-tail, freely given by a relation for advancement of his kinswoman in marriage (*g*),) in this case, if lands descend from the *same* ancestor to her and her sisters in fee-simple, she or her heirs shall have no share of them, unless they will agree to divide the lands so given in frankmarriage in equal proportion with

the common law, is chalked out and provided.

(*f*) Co. Litt. 164, 165.

(*g*) See pag. 115.

(19) A title of honour, for instance. Thus, our author tells us, (in chap. 14, p. 216,) "if a man holds an earldom to him and the heirs of his body, and dies leaving only daughters, the eldest shall not of course be countess, but the dignity is in suspense or abeyance till the king shall declare his pleasure; for he, being the fountain of honour, may confer it on which of them he pleases." And when he has conferred it upon one, if the issue of that one become extinct, it will again be in abeyance, if there are descendants of more than one sister remaining; but upon the failure of issue of all the sisters except one, the descendant of that one, as sole heir, may assume the dignity as of right. (See 1 Inst. 165 a, and 165 b, with Mr. Hargrave's notes thereto.) In the passage cited, Lord Coke intimates, that there is a distinction as to this matter between a title of nobility and an office of honour: and that if the holder of an

office of honour dies, having issue two daughters, before the marriage of either of them, they may jointly make a sufficient deputy to exercise the office for them; and if the eldest daughter marries, her husband has a right to execute the office solely. For which he cites the authority of the *Duke of Buckingham's case*. (Dyer, 285 b.) But this doctrine was overruled nearly half a century ago, when, upon the descent of the office of Great Chamberlain to two sisters, coheiresses of the Duke of Ancaster, one of whom was married, the House of Lords, after calling for the opinions of the twelve judges, determined, conformably thereto, that the office belonged to both sisters; that the husband of the eldest was not of right entitled to execute it; and that both sisters might execute it by deputy, such deputy being of a degree not inferior to a knight, and approved of by the king. (Journ. Dom. Proc. May 25, 1781.)

the rest of the lands descending (*h*). This mode of division was known in the law of the Lombards (*i*); which directs the woman so preferred in marriage, and claiming her share of the inheritance, *mittere in confusum cum sororibus, quantum pater aut frater ei dederit, quando ambulaverit ad maritum*. With us it is denominated bringing those lands into hotch-pot (*k*) (20): which term I shall explain in the very words of Littleton (*l*): “it seemeth that this word *hotch-pot*, is in English a pudding; for in a pudding is not commonly put one thing alone, but one thing with other things together.” By this housewifely metaphor our ancestors meant to inform us (*m*), that the lands, both those given in frankmarriage and those descending in fee-simple, should be mixed and blended together, and then divided in equal portions among all the daughters. But this was left to the choice of the donee in frankmarriage: and if she did not choose to put her lands into hotch-pot, she was presumed to be sufficiently *provided for, and the rest of the inheritance was divided among her other sisters. The law of hotch-pot took place then only, when the other lands de-

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(*h*) Bracton, l. 2, c. 34; Litt. s. 266 to 273.

(*i*) l. 2, t. 14, c. 15.

(*k*) Britton, c. 72.

(*l*) s. 267.

(*m*) Litt. s. 268.

(20) The fifth section of the statute of distributions (22 & 23 Car. II. c. 10,) after providing, that, before a final distribution of an intestate's effects takes place, any advancement made by him in his life-time to his children, claiming distribution, shall be brought into hotch-pot; makes a distinction in favour of the heir, who is to take an equal part in the distribution with the rest of the intestate's children, without any consideration of the value of any *land* which he hath by descent, or otherwise, from the intestate. But it is only as to real estate that the heir at law is exempted from bringing into hotch-pot any advances made to him in his father's life-time: if the heir have received any advancement by money, or personal estate of any kind, that is to be reckoned as part of his share. (*Pratt*

v. Pratt, Fitz-Gib. 84; *Anonym.* 2 Freem. 190.)

It seems that, where any child takes under his father's will part of the testator's personal estate, and there is an intestacy as to the residue, the child can take a share of that, without bringing into hotch-pot what he took under the will; notwithstanding it is now understood to be settled law, that what is taken under a will must be deemed an advancement in the life-time of the testator: (*Onslow v. Michell*, 18 Ves. 494; *Leake v. Leake*, 10 Ves. 489; *Goolding v. Haverfield*, M'Clel. 357:) but Lord Eldon thought, that, to *such* advancements, the provision of the statute as to bringing into hotch-pot did not apply. (*Twisden v. Twisden*, 9 Ves. 426.)

This note is extracted from 1 Hovenden's Supp. to Ves. jun. Rep. 558.

scending from the ancestor were fee-simple; for if they descended in tail, the donee in frankmarriage was entitled to her share, without bringing her lands so given into hotch-pot (*n*). And the reason is, because lands descending in fee-simple are distributed by the policy of law, for the maintenance of all the daughters; and, if one has a sufficient provision out of the same inheritance, equal to the rest, it is not reasonable that she should have more: but lands descending in tail are not distributed by the operation of the law, but by the designation of the giver, *per formam doni*: it matters not therefore how unequal this distribution may be. Also no lands, but such as are given in frankmarriage, shall be brought into hotch-pot; for no others are looked upon in law as given for the advancement of the woman, or by way of marriage portion (*o*). And, therefore, as gifts in frankmarriage are fallen into disuse, I should hardly have mentioned the law of hotch-pot, had not this method of division been revived and copied by the statute for distribution of personal estates, which we shall hereafter consider at large (21).

The modes by which an estate in coparcenary may be dissolved.

The estate in coparcenary may be *dissolved*, either by partition, which disunites the possession; by alienation of one parcener, which disunites the title, and may disunite the interest; or by the whole at last descending to and vesting in one single person, which brings it to an estate in severalty.

IV. Of tenants in common.

IV. Tenants in *common* are such as hold by several and distinct titles, but by unity of possession; because none knoweth his own severalty, and therefore they all occupy promiscuously (*p*). This tenancy therefore happens where there is a unity of possession merely, but perhaps an entire disunion of interest, of title, and of time. For if there be two tenants in common of lands, one may hold his part in fee-simple, the other in tail, or for life; so that there is no

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*necessary unity of interest: one may hold by descent, the other by purchase; or the one by purchase from A., the other by purchase from B.; so that there is no unity of title: one's estate may have been vested fifty years, the other's

(*n*) Litt. s. 274.

(*o*) Ibid. 275.

(*p*) Ibid. 292.

(21) See *post*, chap. 32, pp. 515, 517, 519.

but yesterday; so there is no unity of time. The only unity there is, is that of possession; and for this Littleton gives the true reason, because no man can certainly tell which part is his own: otherwise even this would be soon destroyed.

Tenancy in common may be created, either by the destruction of the two other estates, in joint-tenancy and coparcenary, or by special limitation in a deed. By the destruction of the two other estates, I mean such destruction as does not sever the unity of possession, but only the unity of title or interest: As, if one of two joint-tenants in fee alienes his estate for the life of the alienee, the alienee and the other joint-tenant are tenants in common; for they have now several titles, the other joint-tenant by the original grant, the alienee by the new alienation (*q*); and they also have several interests, the former joint-tenant in fee-simple, the alienee for his own life only. So, if one joint-tenant gives his part to A. in tail, and the other gives his to B. in tail, the donees are tenants in common, as holding by different titles and conveyances (*r*). If one of two parceners alienes, the alienee and the remaining parcener are tenants in common (*s*); because they hold by different titles, the parcener by descent, the alienee by purchase. So likewise, if there be a grant to two *men*, or two *women*, and the heirs of their bodies, here the grantees shall be joint-tenants of the life-estate, but they shall have several inheritances; because they cannot possibly have one heir of their two bodies, as might have been the case had the limitation been to *a man and woman*, and the heirs of their bodies begotten (*t*): and in this, and the like cases, their issues shall be tenants in common; because they must claim by different titles, one as heir of A., and the other as heir of B.; and those two not titles by *purchase, but descent. In short, whenever an estate in joint-tenancy or coparcenary is dissolved, so that there be no partition made, but the unity of possession continues, it is turned into a tenancy in common.

Tenancy in common may be created by the dissolution or destruction of an estate in joint-tenancy or coparcenary, where there is no partition made;

A tenancy in common may also be created by express limitation in a deed: but here care must be taken not to

Or by express limitation in a deed,

(*q*) Litt. s. 293.

(*s*) Ibid. 309.

(*r*) Ibid. s. 295.

(*t*) Ibid. 283.

insert words which imply a joint estate (22); and then if lands be given to two or more, and it be not joint-tenancy, it must be a tenancy in common. But the law is apt in its constructions to favour joint-tenancy rather than tenancy in common (*u*) (23); because the divisible services issuing from land (as rent, &c.) are not divided, nor the entire services (as fealty) multiplied, by joint-tenancy, as they must necessarily be upon a tenancy in common. Land given to two, to be holden the one moiety to one, and the other moiety to the other, is an estate in common (*w*); and, if one grants to another *half* his land, the grantor and grantee are also tenants in common (*x*): because, as has been before (*y*) observed, joint-tenants do not take by distinct halves or moieties; and by such grants the division and severalty of the estate is so plainly expressed that it is impossible they should take a joint-interest in the whole of the tenements. But a *devise* to two persons to hold *jointly and severally*, is said to be a joint-tenancy (*z*); because that is necessarily implied in the word “jointly,” the word “severally” perhaps only implying the power of partition: and an estate given to A. and B., *equally to be divided* between them, though in *deeds* it hath been said to be a joint-tenancy (*a*), (for it implies no more than the law has annexed to that estate, *viz.* divisibility (*b*),) yet in *wills* it is certainly a tenancy in common (*c*); because the devisor may be presumed to have meant what is most beneficial to both the devisees, though his meaning is imperfectly expressed. And this nicety in the wording of grants makes it the most usual as well as the safest way, when a tenancy in common *is meant to be created, to add express words of exclusion as well as description, and limit the estate to A. and B., to hold *as tenants in common and not as joint-tenants*.

Or will.

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Of the incidents attending a tenancy in common.

As to the *incidents* attending a tenancy in common: tenants in common (like joint-tenants) are compellable by

(*u*) Salk. 392.

(*w*) Litt. s. 298.

(*x*) Ibid. 299.

(*y*) See p. 182.

(*z*) Poph. 52.

(*a*) 1 Eq. Cas. Abr. 291.

(*b*) 1 P. Wms. 17.

(*c*) 3 Rep. 39; 1 Ventr. 32.

(22) See *ante*, the conclusion of the note to p. 187.

(23) See *ante*, note last referred to.

the statutes of Henry VIII. and William III., before mentioned (*d*), to make partition of their lands; which they were not at common law. They properly take by distinct moieties, and have no entirety of interest; and therefore there is no survivorship between tenants in common. Their other incidents are such as merely arise from the unity of possession; and are therefore the same as appertain to joint-tenants merely upon that account: such as being liable to reciprocal actions of waste, and of account, by the statutes of Westm. 2, c. 22, and 4 Ann. c. 16, § 27. For by the common law no tenant in common was liable to account with his companion for embezzling the profits of the estate (*e*); though, if one actually turns the other out of possession, an action of ejectment will lie against him (*f*) (24). But, as

(*d*) Pag. 185 and 189.

(*e*) Co. Litt. 199.

(*f*) Ibid. 200.

(24) In the case of *Fairclaim v. Shackleton*, (5 Burr. 2607, 2608,) it seems to have been considered that the perception of the whole profits of an estate, for any length of time, by one tenant in common, could never operate as a disseisin of the other tenant in common. But, not long afterwards, it was determined, in the case of *Doe v. Prosser*, (Cowp. 218,) that the term "actual ouster" did not necessarily imply some act accompanied with force; that a man might come in by rightful possession, yet hold over adversely without a title; and that, if he did so, such holding over might be equivalent to an actual ouster.

A plaintiff's right to recover in ejectment, after twenty years, was taken away by the statute of limitations of Henry VIII. And courts of equity have, at all times, upon general principles of their own, even where there was no statutable bar, refused relief to stale demands, where the party had slept upon his rights for a great length of time: and where a bar had been fixed by statute to the remedy at common law, the remedy in a court of equity was, in analogous

cases, confined to the same period. (*Marquis of Cholmondeley v. Lord Clinton*, 2 Jac. & Walk. 151, in the judgment upon which case all the leading authorities are cited.) Even in cases of fraud, courts of equity took the statutes of limitation for their guides in general. (*Stackhouse v. Barnston*, 10 Ves. 467; *Bonney v. Ridgard*, 1 Cox, 149; *Beckford v. Wade*, 17 Ves. 97.) And the objection of length of time *may* be taken by demurrer, when a bill is so framed as to be open to that mode of defence; but as the plaintiff's pleader will, of course, generally take care this shall not be the case, a plea is the more usual mode of taking advantage of length of time in bar of a plaintiff's claim. (*Foster v. Hodson*, 19 Ves. 184; *Lord Shipbrook v. Lord Hinchinbroke*, 13 Ves. 397; *Hodley v. Healey*, 1 Ves. & Bea. 539.)

Since this note was first published, the statute of 3 & 4 Gul. IV. c. 27, has enacted that (with certain savings, in cases of specified disabilities,) no person shall make an entry or distress or bring an action to recover any rent or land but within twenty years next after the right accrued; the 12th sec-

for other incidents of joint-tenants, which arise from the privity of title, or the union and entirety of interest, (such as joining or being joined in actions (*g*), unless in the case where some entire or indivisible thing is to be recovered (*h*),) these are not applicable to tenants in common whose interests are distinct, and whose titles are not joint but several.

Of the modes
by which estates
in common may
be dissolved.

Estates in common can only be *dissolved* two ways: 1. By uniting all the titles and interests in one tenant, by purchase or otherwise; which brings the whole to one severalty: 2. By making partition between the several tenants in common, which gives them all respective severalties. For indeed tenancies in common differ in nothing from sole estates but merely in the blending and unity of possession. And this finishes our inquiries with respect to the nature of *estates*.

(*g*) Litt. s. 311.

(*h*) Co. Litt. 197.

tion of the act, as to the possession of one tenant in common, has been already adverted to, in note 5 to p. 182; and the 24th section of the act limits suits in equity, for the recovery of rent or land, to the

same period within which an entry or distress might have been made, or an action brought to recover the land or rent, if the claimant's title had been a legal one.

CHAPTER XIII.

OF THE TITLE TO THINGS REAL, IN GENERAL.

THE foregoing chapters having been principally employed in defining the *nature* of things real, in describing the *tenures* by which they may be holden, and in distinguishing the several kinds of *estate* or interest that may be had therein ; I come now to consider, lastly, the *title* to things real, with the manner of acquiring and losing it.

Of the title to things real.

A title is thus defined by Sir Edward Coke (a), *titulus est justa causa possidendi id quod nostrum est* ; or, it is the means whereby the owner of lands hath the just possession of his property.

Definition of "title."

There are several stages or degrees requisite to form a complete title to lands and tenements. We will consider them in a progressive order.

Of the requisites to form a complete title.

I. The lowest and most imperfect degree of title consists in the mere *naked possession*, or actual occupation of the estate ; without any apparent right, or any shadow or pretence of right, to hold and continue such possession. This may happen, when one man invades the possession of another, and by force or surprise turns him out of the occupation of his lands ; which is termed a *disseisin*, being a deprivation of that actual seisin, or corporal freehold of the lands, which the tenant before enjoyed. Or it may happen, that after the death of the ancestor and before the entry of the heir, or after the *death of a particular tenant and before the entry of him in remainder or reversion, a stranger may contrive to get possession of the vacant land, and hold out

I. The naked possession, or actual occupation of the estate.

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(a) 1 Inst. 345.

him that had a right to enter (1). In all which cases, and many others that might be here suggested, the wrongdoer has only a mere naked possession, which the rightful owner may put an end to, by a variety of legal remedies, as will more fully appear in the third book of these commentaries. But in the mean time, till some act be done by the rightful owner to divest this possession and assert his title, such actual possession is, *primâ facie*, evidence of a legal title in the possessor; and it may, by length of time, and negligence of him who hath the right, by degrees ripen into a perfect and indefeasible title (2). And, at all events, without such actual possession no title can be completely good.

II. The right of possession.

II. The next step to a good and perfect title is the *right of possession*, which may reside in one man, while the actual possession is not in himself but in another. For if a man be disseised, or otherwise kept out of possession, by any of the means before mentioned, though the *actual* possession be lost, yet he has still remaining in him the *right* of possession; and may exert it whenever he thinks proper, by entering upon the disseisor, and turning him out of that occupancy which he has so illegally gained. But this right of possession is of two sorts: an *apparent* right of possession, which may be defeated by proving a better; and an *actual* right of possession, which will stand the test against all opponents. Thus, if the disseisor, or other wrongdoer, dies possessed of the land whereof he so became seised by his own unlawful act, and the same descends to his heir; now by the common law the heir hath obtained an *apparent* right, though the *actual* right of possession resides in the person disseised; and it shall not be lawful for the person disseised to divest this apparent right by mere entry (3) or other act of his own, but only by an action at law (*b*): for, until the contrary be proved by legal demonstration, the law will rather presume the right to *reside in the heir, whose ancestor died seised, than in one who has no such presumptive evidence to urge in his own behalf. Which

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(b) Litt. s. 385.

(1) See *ante*, p. 194, note.

(2) See the note last referred to.

(3) But now, no descent or discon-

tinuance bars the right of entry. See stat. 3 & 4 Gul. IV. c. 27, s. 39.

doctrine in some measure arose from the principles of the feudal law, which, after feuds became hereditary, much favoured the right of descent; in order that there might be a person always upon the spot to perform the feudal duties and services (c): and therefore when a feudatory died in battle, or otherwise, it presumed always that his children were entitled to the feud, till the right was otherwise determined by his fellow-soldiers and fellow-tenants, the peers of the feudal court. But if he, who has the actual right of possession, puts in his claim, and brings his action within a reasonable time, and can prove by what unlawful means the ancestor became seised, he will then by sentence of law recover that possession, to which he hath such actual right. Yet, if he omits to bring this his possessory action, within a competent time, his adversary may imperceptibly gain an actual right of possession, in consequence of the other's negligence. And by this, and certain other means, the party kept out of possession may have nothing left in him, but what we are next to speak of; *viz.*

III. The mere *right of property*, the *jus proprietatis*, III. The right of property. without either possession or even the right of possession. This is frequently spoken of in our books under the name of the *mere right*, *jus merum*; and the estate of the owner is in such cases said to be totally divested, and *put to a right* (d). A person in this situation may have the true ultimate property of the lands in himself: but by the intervention of certain circumstances, either by his own negligence, the solemn act of his ancestor, or the determination of a court of justice, the presumptive evidence of that right is strongly in favour of his antagonist; who has thereby obtained the absolute right of possession. As, in the first place, if a person disseised, or turned out of possession of his estate, neglects to pursue his remedy within the time limited by law: by this means the disseisor or his heirs gain the actual right of possession: *for the law presumes that [* 198] either he had a good right originally, in virtue of which he entered on the lands in question, or that since such his entry he has procured a sufficient title; and, therefore, after so long an acquiescence, the law will not suffer his possession to be disturbed without inquiring into the absolute

(c) Gilb. Ten. 18.

(d) Co. Litt. 345.

right of property. Yet, still, if the person disseised or his heir hath the true right of property remaining in himself, his estate is indeed said to be turned into a mere right: but, by proving such his better right, he may at length recover the lands. Again, if a tenant in tail discontinues his estate-tail, by alienating the lands to a stranger in fee, and dies; here the issue in tail hath no right of *possession*, independent of the right of *property*: for the law presumes *primâ facie* that the ancestor would not disinherit, or attempt to disinherit, his heir, unless he had power so to do; and therefore, as the ancestor had in himself the right of possession, and has transferred the same to a stranger, the law will not permit that possession now to be disturbed (4), unless by showing the absolute right of property to reside in another person. The heir therefore in this case has only a *mere right*, and must be strictly held to the proof of it, in order to recover the lands. Lastly, if by accident, neglect, or otherwise, judgment is given for either party in any *possessory* action, (that is, such wherein the right of possession only, and not that of property, is contested,) and the other party hath indeed in himself the right of property, this is now turned to a *mere right*; and upon proof thereof in a subsequent action, denominated a writ of right (5), he shall recover his seisin of the lands.

The possession, the right of possession, and the right of property, may each be in a different person.

[* 199]

Thus, if a disseisor turns me out of possession of my lands, he thereby gains a *mere naked possession*, and I still retain the *right of possession*, and *right of property*. If the disseisor dies, and the lands descend to his son, the son gains an *apparent* right of *possession*; but I still retain the *actual* right both of *possession* and *property*. If I acquiesce for thirty years (6), without bringing any action to recover possession of the lands, the son gains the *actual right of possession*, and I retain *nothing but the *mere right of property*. And even this right of property will fail, or at least it will be without a remedy, unless I pursue it within the space of sixty years (7). So also if the father be tenant in

(4) But see the statute cited in the note to p. 196.

(5) Abolished by stat. 3 & 4 Gul. IV. c. 27, s. 36.

(6) The term is now twenty years;

see the stat. of 3 & 4 Gul. IV. c. 27, s. 2.

(7) Unless the claimant comes within some of the savings of the act cited in the last note, at the end of

tail, and alienes the estate-tail to a stranger in fee, the alie-
nee thereby gains the *right of possession*, and the son hath
only the *mere right* or *right of property*. And hence it will
follow, that one man may have the *possession*, another the
right of possession, and a third the *right of property*. For
if tenant in tail infeoffs A. in fee-simple, and dies, and B.
disseises A.; now B. will have the *possession*, A. the *right*
of possession, and the issue in tail the *right of property*.
A. may recover the possession against B.; and afterwards
the issue in tail may evict A., and unite in himself the
possession, the right of possession, and also the right of
property. In which union consists,

IV. A complete title to lands, tenements, and heredita-
ments. For it is an ancient maxim of the law (e), that no
title is completely good, unless the right of possession be
joined with the right of property; which right is then deno-
minated a double right, *jus duplicatum*, or *droit droit* (f).
And when to this double right the actual possession is
also united; when there is, according to the expression of
Fleta (g), *juris et seisinæ conjunctio*, then, and then only, is
the title completely legal.

IV. A complete
legal title exists
where the right
of possession is
joined with the
right of pro-
perty.

(e) Mirr. l. 2, c. 27.

(f) Co. Litt. 266; Bract. l. 5, tr. 3, c. 5.

(g) L. 3, c. 15, s. 5.

twenty years after the right to land
or rent first accrued, not only the

remedy but the right is extinguished,
by the 34th section of the statute.

CHAPTER XIV.

OF TITLE BY DESCENT (1).

Of the modes
of acquiring
and losing title ;

THE several gradations and stages, requisite to form a complete title to lands, tenements, and hereditaments, having been briefly stated in the preceding chapter, we are next to consider the several manners in which this complete title (and therein principally the right of *propriety*;) may be reciprocally lost and acquired : whereby the dominion of

(1) The statute of 3 & 4 Gul. IV. c. 106, for the amendment of the law of inheritance, enacts, that in every case descent shall be traced from the purchaser, but the last owner shall be considered to be the purchaser, unless it shall be proved that he inherited the land. It is also enacted, that an heir who is entitled under a will shall take as devisee, and not by descent ; and a limitation in any assurance to the grantor and his heirs shall create an estate by purchase : but if any person acquires land by purchase, under a limitation to the heirs, or the heirs of the body, of any of his ancestors, such land shall descend, and the descent shall be traced as if the ancestor named in such limitation had been the purchaser of the land. It is further enacted, that no brother or sister shall be considered to inherit immediately from his or her brother or sister, but shall trace descent through their common parent ; and every lineal ancestor may be heir to any of his issue, in preference to collate-

ral persons claiming through him ; the male line to be preferred throughout in tracing descents ; but, in case of the failure of male paternal ancestors of the person from whom the descent is to be traced upwards, and of their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to a less remote paternal ancestor ; and the mother of his more remote male maternal ancestor, and her descendants, shall be heir or heirs, in preference to the mother of a less remote male maternal ancestor. And it is further enacted, that any person related to the person from whom the descent is to be traced by the half blood shall be capable of being his heir, and shall stand next in order of inheritance after any relation of the same degree of the whole blood, and his issue, where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female : and

things real is either continued, or transferred from one man to another. And here we must first of all observe, that (as gain and loss are terms of relation, and of a reciprocal nature) by whatever method one man gains an estate, by that same method or its correlative some other man has lost it. As where the heir acquires by descent, the ancestor has first lost or abandoned his estate by his death: where the lord gains land by escheat, the estate of the tenant is first of all lost by the natural or legal extinction of all his hereditary blood: where a man gains an interest by occupancy, the former owner has previously relinquished his right of possession: where one man claims by prescription or immemorial usage, another man has either parted with his right by an ancient and now forgotten grant, or has forfeited it by the supineness or neglect of himself and his ancestors for ages; and so, in case of forfeiture, the tenant by his own misbehaviour or neglect has renounced his interest in the estate; whereupon it devolves to that person who by law may take advantage of such default; and, in alienation by common assurances, the two considerations of loss and acquisition are so interwoven, and so constantly contemplated together, that we never hear of a conveyance, without at once receiving the ideas as well of the grantor as the grantee. [* 201]

The methods therefore of acquiring on the one hand, and of losing on the other, a title to estates in things real, are reduced by our law to two: *descent*, where the title is vested in a man by the single operation of law; and *purchase*, where the title is vested in him by his own act or agreement (a) (2). which are two—
descent, and purchase.

(a) Co. Litt. 18.

after the death of a person attainted, his descendants may inherit. The act does not extend to any descent which took place before the 1st of January, 1834, nor to any assurance executed before the said date, or the will of any person who died before the said date, which assurance or will contains any limitation or gift to the heir or heirs of any person under which the person or persons answering the description of heir would have been entitled to an

estate by purchase if this act had not been made; but such limitation or gift shall take effect, whether the person named as ancestor was or was not living on the said 1st day of January, 1834.

(2) Mr. Hargrave (in his 2nd note to Co. Litt. 18 b) observes;—an *escheat* in appearance participates of the nature both of a *purchase* and a *descent*; of the *former*, because some act by the lord, to whom the land re-

Descent is where a man acquires his estate as heir-at-law.

Descent, or hereditary succession, is the title whereby a man on the death of his ancestor acquires his estate by right

verts by escheat, is requisite to perfect his title, and the actual possession of the land cannot be granted till he enters, or brings his writ of escheat : of the *latter*, because it follows the nature of the seignory, and is inheritable by the same persons ; but, strictly speaking, an escheat is a title neither by purchase nor descent. It should be considered, that, although the lord must do some act to put himself into the actual possession ; yet, his *title* to take possession commences immediately on the want of a tenant, and this title is vested in him without waiting for his own deed or agreement, and as much by the mere act of law as the title of an heir is, in the case of a descent ; and therefore, (according to Mr. Hargrave,) the titles of the lord and of the heir are equally excluded from being considered as acquisitions by *purchase*. On the other hand, escheat is not a title by *descent* ; for the lord takes it in his capacity of lord of the seignory of which the land escheated was holden, and not as heir, or by right of blood. Nor is it any objection to this way of considering the title by escheat, that the land escheated will be inheritable in the lord as land by purchase, where he has the seignory by purchase, and as land by descent, where he has the seignory by descent ; for the reason of this is, not that the escheat is either a purchase or a descent, but because the escheat follows the seignory, from which the right to it is derived. According to this view of the subject, Mr. Hargrave thought, instead of distributing all the several titles to land under the heads of purchase or descent, it would be more accurate to say, that the title to land is either by *purchase*, to which the act or agreement of the party is essential, or by *mere act of law* ; and under the lat-

ter, to consider first, descent, and then escheat, and such other titles, not being by descent, as yet, like titles by descent, accrue by mere act of law.

So, we learn from Lord Coke (1 Instit. 2 b), that if an alien purchases lands, he cannot hold them ; the king is entitled to them : though in such case the king plainly takes neither by purchase, (according to Mr. Hargrave's explanation,) nor by descent. Again (1 Instit. 3 b) Lord Coke says, "a purchase is when one cometh to lands by conveyance or title ; and disseisins, abatements, intrusions, usurpations, and such like estates gained by wrong, are not purchases ;"—and it is equally clear they are not acquisitions by descent. And (in 1 Instit. 18 b) Lord Coke gives other instances of titles, which, in strictness, if we admit Mr. Hargrave's explanation, can be referred neither to purchase nor descent : as escheats, and tenancy by curtesy, or in dower.

If, however, we prefer our author's opinion, as he states it in the 15th chapter of this volume, (p. 242,) and hold that "the word *purchase* denotes *any* means of acquiring an estate out of the common mode of inheritance," we must reject not only Mr. Hargrave's distinction as to escheat, but also deny Lord Coke to have been right, when he said, that "disseisins, abatements, intrusions, usurpations and such like estates, gained by wrong, are *not* purchases." (See Watkins's Law of Descents, ch. 1, sect. 1 ; and ch. 5, p. 156 of the original edition, or p. 232 of the 2nd edition.)

Since this note was first published, the statute of 3 & 4 Gul. IV. c. 106, has enacted, that in that act, the word "purchaser" shall mean the person who last acquired land otherwise than by descent, or than by *escheat*, par-

of representation, as his heir at law. An heir therefore is he upon whom the law casts the estate immediately on the death of the ancestor: and an estate, so descending to the heir, is in law called the inheritance.

The doctrine of descents, or law of inheritances in fee-simple, is a point of the highest importance; and is indeed the principal object of the laws of real property in England. All the rules relating to purchases, whereby the legal course of descents is broken and altered, perpetually refer to this settled law of inheritance, as a *datum* or first principle universally known, and upon which their subsequent limitations are to work. Thus, a gift in tail, or to a man and the heirs of his body, is a limitation that cannot be perfectly understood without a previous knowledge of the law of descents in fee-simple. One may well perceive that this is an estate confined in its descent to such heirs only of the donee, as have sprung or shall spring from his body; but who those heirs are, whether all his children both male and female, or the male only, and (among the males) whether the eldest, youngest, or other son alone, or all the sons together, shall be his heir; this is a point that we must resort back to the standing law of descents in fee-simple to be informed of.

Of the doctrine of descents.

*In order therefore to treat a matter of this universal consequence the more clearly, I shall endeavour to lay aside such matters as will only tend to breed embarrassment and confusion in our inquiries, and shall confine myself entirely to this one object. I shall therefore decline considering at present who are, and who are not, capable of being heirs; reserving that for the chapter of *escheats*. I shall also pass over the frequent division of descents in those by *custom*, *statute*, and *common law*: for descents by *particular custom* (3), as to all the sons in gavelkind, and to the youngest

[* 202]

tition, or inclosure, by the effect of which the land shall become part of, or descendible with, other land *acquired by descent*. And by the statute of 4 & 5 Gul. IV. c. 23, the *legal* rights to trust property, accruing by escheat, either to the crown, to corporations, or to individual lords of manors, in consequence of the failure of heirs of the trustee or of his attainer, are

subjected to the control of the Court of Chancery, for the use of the party beneficially interested. It is probable that the law of escheat will undergo alteration during the present session of parliament (1836), notice of a bill to that effect having been given.

(3) See *ante*, the notes to pp. 83, 84, 85.

in borough-english, have already been often (*b*) hinted at, and may also be incidentally touched upon again; but will not make a separate consideration by themselves, in a system so general as the present: and descents by *statute*, or fees-tail (4) *per formam doni*, in pursuance of the statute of Westminster the second, have also been already (*c*) copiously handled; and it has been seen that the descent in tail is restrained and regulated according to the words of the original donation, and does not entirely pursue the common law doctrine of inheritance; which, and which only, it will now be our business to explain.

Of the several degrees of consanguinity.

And, as this depends not a little on the nature of kindred, and the several degrees of consanguinity, it will be previously necessary to state, as briefly as possible, the true notion of this kindred or alliance in blood (*d*).

Consanguinity is either *lineal* or *collateral*.

Consanguinity, or kindred, is defined by the writers on these subjects to be "*vinculum personarum ab eodem stipite descendendum*;" the connexion or relation of persons descended from the same stock or common ancestor. This consanguinity is either lineal, or collateral (5).

[* 203]

Lineal consanguinity is that which subsists between persons of whom one is descended in a direct line from the other.

* Lineal consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other, as between John Stiles (the *propositus* in the table of consanguinity) and his father, grandfather, great grandfather, and so upwards in the direct ascending line; or between John Stiles and his son, grandson, great-grandson, and so downwards in the direct descending line. Every generation, in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards: the father of John Stiles is related to him in the first degree, and so likewise is his son; his grandsire and grandson in

(*b*) See Vol. I. p. 74, 75; Vol. II. pag. 83, 85.

(*c*) See pag. 112, &c.

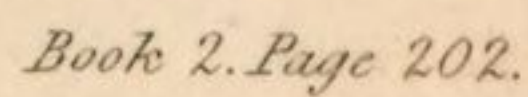
(*d*) For a fuller explanation of the doctrine of consanguinity, and the

consequences resulting from a right apprehension of its nature, see *An Essay on Collateral Consanguinity*. (Law Tracts, Oxon. 1762, 8vo. or 1771, 4to.)

(4) See *ante*, the notes to pp. 110, 111, 112.

(5) The reader will do well to examine the table of consanguinity inserted at the close of the third chapter of Watkins' Essay on the Law of De-

scents, for a graphical illustration of this subject; and the whole essay will abundantly repay the trouble of perusal; though *all* Mr. Watkins' propositions may not be implicitly acceded to.



the second ; his great-grandsire and great-grandson in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore universally obtains, as well in the civil (*e*), and canon (*f*), as in the common law (*g*).

The doctrine of lineal consanguinity is sufficiently plain and obvious ; but it is at the first view astonishing to consider the number of lineal ancestors which every man has, within no very great number of degrees ; and so many different bloods (*h*) is a man said to contain in his veins, as he hath lineal ancestors. Of these he hath two in the first ascending degree, his own parents ; he hath four in the second, the parents of his father and the parents of his mother ; he hath eight in the third, the parents of his two grandfathers and two grandmothers ; and by the same rule of progression, he hath an hundred and twenty-eight in the seventh ; a thousand and twenty-four in the tenth ; and at the twentieth degree, or the distance of twenty generations, every man hath above a million of ancestors, as common arithmetic will demonstrate (*i*). This lineal consanguinity,

Lineal relations are such as descend one from the other, and both from one common ancestor.

(*e*) Ff. 38. 10. 10.

(*f*) Decretal. l. 4, tit. 14.

(*g*) Co. Litt. 23.

(*h*) Ibid. 12.

(*i*) This will seem surprising to those who are unacquainted with the increasing power of progressive numbers : but is palpably evident from the following table of a geometrical pro-

gression, in which the first term is 2, and the denominator also 2 : or, to speak more intelligibly, it is evident, for that each of us has two ancestors in the first degree ; the number of whom is doubled at every remove, because each of our ancestors has also two immediate ancestors of his own.

Lineal Degrees.

Number of Ancestors.

1	2
2	4
3	8
4	16
5	32
6	64
7	128
8	256
9	512
10	1024
11	2048
12	4096
13	8192
14	16384
15	32768
16	65536
17	131072

[*204] we may observe, falls strictly within the definition of *vinculum *personarum ab eodem stipite descendentium*; since lineal relations are such as descend one from the other, and both of course from the same common ancestor.

Of collateral kindred.

Collateral kindred answers to the same description: collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestor; but differing in this, that they do not descend one from the other. Collateral kinsmen are such then as lineally spring from one and the same ancestor, who is the *stirps*, or root, the *stipes*, trunk, or common stock, from whence these relations are branched out. As if John Stiles hath two sons, who have [*205] *each a numerous issue; both these issues are lineally descended from John Stiles as their common ancestor; and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them *consanguineos*.

Collateral consanguinity also consists in the descent from one common ancestor.

We must be careful to remember, that the very being of collateral consanguinity consists in this descent from one and the same common ancestor. Thus *Titius* and his brother are related: why? because both are derived from one father: *Titius* and his first cousin are related: why? because both descend from the same grandfather; and his second cousin's claim to consanguinity is this, that they both are derived from one and the same great-grandfather. In short, as many ancestors as a man has, so many common stocks he has, from which collateral kinsmen may be derived. And as we are taught by holy writ, that there is one couple of ancestors belonging to us all, from whom the whole race of mankind is descended, the obvious and undeniable consequence is, that all men are in some degree related to each other. For indeed, if we only suppose each couple of our

<i>Lineal Degrees.</i>	<i>Number of Ancestors.</i>
18	262144
19	524288
20	1048576

A shorter method of finding the number of ancestors at any even degree is by squaring the number of ancestors at half that number of degrees. Thus 16 (the number of ancestors at four degrees) is the square of 4, the number of ancestors at two; 256 is the square of 16; 65536 of 256; and the number of ancestors at 40 degrees would be the square of 1048576, or upwards of a million millions.

ancestors to have left, one with another, two children; and each of those children on an average to have left two more; (and without such a supposition, the human species must be daily diminishing,) we shall find that all of us have now subsisting near two hundred and seventy millions of kindred in the fifteenth degree, at the same distance from the several common ancestors as ourselves are; besides those that are one or two descents nearer to or farther from the common stock, who may amount to as many more (*k*). And if this

(*k*) This will swell more considerably than the former calculation; for here, though the first term is but one, the denominator is four: that is, there is *one* kinsman (a brother) in the first degree, who makes, together with the *propositus*, the two descendants from the first couple of ancestors; and in every other degree the number of kindred must be the *quadruple* of those in the degree which immediately precedes it. For, since each couple of ances-

tors has two descendants, who increase in a duplicate *ratio*, it will follow that the *ratio*, in which all the descendants increase downwards, must be double to that in which the ancestors increase upwards: but we have seen that the ancestors increase upwards in a duplicate *ratio*: therefore the descendants must increase downwards in a double duplicate, that is, in a quadruple *ratio* (6).

Collateral Degrees.	Number of Kindred.
1	1
2	4
3	16
4	64
5	256
6	1024
7	4096
8	16384
9	65536
10	262144
11	1048576
12	4194304
13	16777216
14	67108864
15	268435456
16	1073741824
17	4294967296
18	17179869184
19	68719476736
20	274877906944

This calculation may also be formed by a more compendious process, *viz.* by squaring the couples, or half the number of ancestors, at any given degree; which will furnish us with the number of kindred we have in the

(6) Mr. Christian observes, “ that the learned judge’s reasoning is just and correct; and that the collateral relations are quadrupled in each gene-

calculation should appear incompatible with the number of inhabitants on the earth, it is because, by intermarriages among the several descendants from the same ancestor, a hundred or a thousand modes of consanguinity may be consolidated in one person, or he may be related to us a hundred or a thousand different ways.

[* 206]
The method of
computing the
degrees of con-
sanguinity.

*The method of computing these degrees in the canon law (*l*), which our law has adopted (*m*) (7), is as follows: We begin at the common ancestor, and reckon downwards; and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the *degree in which they are related to each other. Thus *Titius* and his brother are related in the first degree; for

[* 207]

same degree, at equal distance with ourselves from the common stock, besides those at unequal distances. Thus, in the tenth lineal degree, the number of ancestors is 1024; its half, or the couples, amount to 512; the number of kindred in the tenth collateral degree amounts therefore to 262144, or the square of 512. And if we will be at the trouble to recollect the state of the several families

within our own knowledge, and observe how far they agree with this account; that is, whether, on an average, every man has not one brother or sister, four first cousins, sixteen second cousins, and so on; we shall find that the present calculation is very far from being overcharged.

(*l*) Decretal. 4. 14. 3 & 9.

(*m*) Co. Litt. 23.

ration may be thus demonstrated:—As we are supposed, upon an average, to have one brother or sister, the two children by the father's brother or sister will make two cousins, and the mother's brother or sister will produce two more, in all, four. For the same reason, my father and mother must each have had four cousins, and their children are my second cousins; so I have eight second cousins by my father, and eight by my mother; together, sixteen. And thus again, I shall have thirty-two third cousins on my father's side, and thirty-two on my mother's; in all, sixty-four. Hence it follows that each preceding number in the series must be multiplied by twice two, or four.

This immense increase of the numbers depends upon the supposition that no one marries a relation; but to avoid such a connexion it will very soon be

necessary to leave the kingdom. How these two tables of consanguinity may be reduced by the intermarriage of relations, will appear from the following simple case: If two men and two women were put upon an uninhabited island, and became two married couple, if they had only two children each, a male and female, who respectively intermarried, and in like manner produced two children, who are thus continued *ad infinitum*; it is clear, that there would never be more than four persons in each generation; and if the parents lived to see their great grandchildren, the whole number would never be more than sixteen; and thus the families might be perpetuated without any incestuous connexion.

(7) As to the descent of real estates, this is the method of computation: but see the next note.

from the father to each of them is counted only one: *Titius* and his nephew are related in the second degree; for the nephew is two degrees removed from the common ancestor, *viz.* his own grandfather, the father of *Titius*. Or, (to give a more illustrious instance from our English annals,) king Henry the seventh, who slew Richard the third in the battle of Bosworth, was related to that prince in the fifth degree. Let the *propositus* therefore in the table of consanguinity represent king Richard the third, and the class marked (e) king Henry the seventh. Now their common stock or ancestor was king Edward the third, the *abavus* in the same table: from him to Edmond duke of York, the *proavus*, is one degree; to Richard earl of Cambridge, the *avus*, two; to Richard duke of York, the *pater*, three; to king Richard the third, the *propositus*, four; and from king Edward the third to John of Gant (a) is one degree; to John earl of Somerset (b), two; to John duke of Somerset (c), three; to Margaret countess of Richmond (d), four; to king Henry the seventh (e), five. Which last-mentioned prince, being the farthest removed from the common stock, gives the denomination to the degree of kindred in the canon and municipal law. Though, according to the computation of the civilians (8), (who count upwards, from either of the persons related, to the common stock, and then downwards again to the other; reckoning a degree for each person both

(8) The mode of calculating degrees of proximity in the collateral line, for the purpose of determining what parties are entitled, under the statute of distributions, (22 & 23 Car. II. c. 10,) to shares of the personal estate of an intestate, is not the mode of the canonists adopted by the common law in the descent of real estates; (*Cowper v. Cowper*, 2 P. Wms. 735;) but (with one qualification noticed *infra*,) conforms to that of the civilians, as stated in the text; or, in other words, the rule is, to take the sum of the degrees, in both lines, to the common ancestor. (*Mentney v. Petty*, Prec. in Cha. 593. And see *post*, chap. 32, p. 504, 515.)

The instance of exception noticed above, is this. According to the civil law, the brother and the grandmother of an intestate stand in equal degrees

of affinity to him; and the grandmother, as being in the lineal ascending line, was, by that law, preferred to the brother or any other in the collateral line: but, according to the construction put by our courts upon the statute of distributions, (in this instance conforming to the canon law,) the brother, as making title immediately from his deceased brother, is preferred to the grandmother, who could only claim mediately through the father of the deceased. (*Earl of Winchelsea v. Norcliff*, 2 Freem. 95; *Davis v. Blackborough*, 1 P. Wms. 45; *Evelyn v. Evelyn*, Ambl. 191; *Collingwood v. Pace*, 1 Ventr. 423.) The reason above assigned for the preference of a brother to a grandmother does not now hold; see *ante*, the note to p. 200.

ascending and descending,) these two princes were related in the ninth degree: for from king Richard the third to Richard duke of York is one degree; to Richard earl of Cambridge, two; to Edmond duke of York, three; to king Edward the third, the common ancestor, four; to John of Gant, five; to John earl of Somerset, six; to John duke of Somerset, seven: to Margaret countess of Richmond, eight; to king Henry the seventh, nine (*n*).

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The rules of inheritance.

*The nature and degrees of kindred being thus in some measure explained, I shall next proceed to lay down a series of rules or canons of inheritance, according to which estates are transmitted from the ancestor to the heir; together with an explanatory comment, remarking their original and progress, the reasons upon which they are founded, and in some cases their agreement with the laws of other nations.

I. Estates shall lineally *descend* to the issue of the person last seised, but never *ascend*; and the ancestor must be dead.

I. The first rule is, that inheritances shall lineally descend to the issue of the person who last died actually seised, *in infinitum*; but shall never lineally ascend (9).

To explain the more clearly both this and the subsequent rules, it must first be observed, that by law no inheritance can vest, nor can any person be the actual complete heir of another, till the ancestor is previously dead. *Nemo est hæres viventis*. Before that time the person who is next in the line of succession is called an heir apparent, or heir presumptive. Heirs apparent are such, whose right of in-

Heirs apparent.

(*n*) See the table of consanguinity annexed; wherein all the degrees of collateral kindred to the *propositus* are computed, so far as the tenth of the

civilians and the seventh of the canonists inclusive; the former being distinguished by the numeral letters, the latter by the common cyphers.

(9) In conformity with this canon, if a son purchased land, and died without issue, and his father and mother were then living, his father or mother could *not* (as such) inherit such lands immediately from the son. But, if the father or mother were also *cousins* to the son, they may (as such) succeed to the inheritance. (*Eastwood v. Vincke*, 2 P. Wms. 416; and see *ante*, the note to p. 13.)

So, if there were father and two sons, and one of the sons purchased land and died, his brother took the inheritance as heir to him, although the father was living. For, though the father

seems the source of inheritable blood, yet the feud was *supposed* to have already passed him; and therefore, the descent between brother and brother was considered as *immediate*; and in making out the title of one from the other, their common father needed not be named; and if he was living, the descent between the brothers was exactly the same as though he was deceased. (*Collingwood v. Pace*, 1 Ventr. 423; and see *post*, p. 226.) [But since this note was first published these legal conceits have been terminated, by the statute cited *ante*, in the note to p. 200.]

heritance is indefeasible, provided they outlive the ancestor; as the eldest son or his issue, who must by the course of the common law be heir to the father whenever he happens to die. Heirs presumptive are such who, if the ancestor should die immediately, would in the present circumstances of things be his heirs: but whose right of inheritance may be defeated by the contingency of some nearer heir being born: as a brother, or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose present hopes may be hereafter cut off by the birth of a son. Nay, even if the estate hath descended, by the death of the owner, to such brother, or nephew, or daughter; in the former cases, the estate shall be divested and taken away by the birth of a posthumous child; and, in the latter, it shall also be totally divested by the birth of a posthumous son (o) (10) (11).

Heirs presumptive.

*We must also remember, that no person can be properly such an ancestor, as that an inheritance of lands or tenements can be derived from him, unless he hath had actual seisin (12) of such lands, either by his own entry, or by the

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The ancestor must have had actual seisin.

(o) Bro. tit. Descent, 58.

(10) See *ante*, the note to p. 169.

(11) Mr. Christian, in his note upon the passage in the text, observes, that "besides the case of a posthumous child, if lands are given to a son, who dies, leaving a sister his heir; if the parents have, at any distance of time afterwards, another son, this son shall divest the descent upon the sister, and take the estate as heir to his brother. (Co. Litt. 11; Doct. & Stud. 1 Dial. c. 7.) So the same estate may be frequently divested by the subsequent birth of nearer presumptive heirs, before it fixes upon the nearest presumptive heir. As if an estate is given to an only child, who dies, it may descend to an aunt, who may be stripped of it by an after-born uncle, on whom a subsequent sister of the deceased may enter, and who will again be deprived of the estate by the birth of a brother."

(12) See *ante*, p. 128, and the note thereto; and *quære* whether the act

there cited has done away with the necessity of seisin for the purpose stated in the text; if not, the rules laid down in the remainder of this note and in the next, are still applicable.

Seisin of fee-tail, with fee-simple expectant, will not be such a seisin as to transmit the fee-simple to the heir of the person so seised: (Co. Litt. 14 b; 1 Roll. Abr. 628; *Kellow v. Rowden*, 1 Show. 245 :) for he is actually seised of the fee-tail only, though he has power to give, or may forfeit, the remainder in fee. (Hargrave, note (4) to Co. Litt. 14 b; *Kellow v. Rowden*, 3 Mod. 257.)

An entry into parcel of the lands generally, is a sufficient entry as to all the lands situate in the same county. (Co. Litt. 15 a, 252 b.)

The possession of a freehold estate by a tenant is the possession of the freeholder. (*De Grey v. Richardson*, 3 Atk. 470.) Whether the same rule

possession of his own or his ancestor's lessee for years, or by receiving rent from a lessee of the freehold (*p*): or unless he hath had what is equivalent to corporal seisin in hereditaments that are incorporeal (13); such as the receipt of rent, a presentation to the church in case of an advowson (*q*), and the like. But he shall not be accounted an ancestor, who hath had only a bare right or title to enter or be otherwise seised. And therefore, all the cases which will be mentioned in the present chapter, are upon the supposition that the deceased (whose inheritance is now claimed) was

(*p*) Co. Litt. 15.

(*q*) Co. Litt. 11.

applies to copyholds is less clear; in the *Anonymous case* in Moor, (p. 125, pl. 272; and see *Brown's case*, 4 Rep. 22,) it appears to have been so determined: but, in the *Anonymous case* in 3 Leon. (p. 69, pl. 106,) and in 4 Leon. (p. 38, pl. 103,) a contrary doctrine was held; and it was said, that as the possession of a copyholder must be customary, and the possession of his tenant by demise according to the order and course of common law, the possession of the one shall not be said to be the possession of the other.

The entry of a guardian in socage is the actual possession and seisin of the infant who is in wardship: (*Goodtitle v. Newman*, 3 Wils. 528; *Ratcliff's case*, 3 Rep. 42:) but guardianship in socage only applies to cases of legal estates. To such it is one of the incidents; but it is not so to equitable estates. (*The King v. The Inhabitants of Toddington*, 1 Barn. & Ald. 564.)

It seems, that, if a father had made a lease for life, or gift in tail, and died, and his eldest son died in the life of the tenant for life, or tenant in tail, his younger brother, though of the half blood, would even before the statute of 3 & 4 Gul. IV. c. 106, have inherited, because the tenant for life, or tenant in tail, was seised of the freehold, and the eldest son had nothing but the reversion expectant. Therefore, the youngest son would inherit

the land, as heir to his father, who was last seised of the actual freehold. And albeit a rent had been reserved upon the lease for life, and the eldest son had received the rent, yet the younger brother would have inherited; because the seisin of the rent is no actual seisin of the freehold of the land. (Co. Litt. 15 a, and Mr. Hargrave's note 5 thereto; *Amy's v. Cowley*, Aleyne, 89.) This must be borne in mind, in qualification of one of the instances of seisin mentioned in the text.

(13) See *ante*, pp. 17, 20, 41, with the notes thereto. Of a dignity there can be no seisin, nor any possession but such as descends; and therefore there cannot be any possession to affect the descent. (*Ratcliff's case*, 3 Rep. 42; *Lord Grey's case*, Cro. Car. 601.)

Seisin of a manor is good seisin of an advowson, common, &c. *appendant* or *appurtenant* thereto. (Hargrave's note 1 to Co. Litt. 15 b; and *ante*, p. 22, notes.)

But the law has been construed differently with respect to an advowson, &c. *in gross*. (Co. Litt. 15 b.) If the eldest brother dies before a presentation to an advowson, not *appendant* to a manor of which he was seised, it has been held that it will descend to his half brother, as heir to the person last seised, and not to his sister of the whole blood. (1 Burn's E. L. 11; but see the commencement of the last note.)

the last person actually seised thereof. For the law requires this notoriety of possession, as evidence that the ancestor had that property in himself, which is now to be transmitted to his heir. Which notoriety had succeeded in the place of the ancient feudal investiture (14), whereby, while feuds were precarious, the vassal on the descent of lands was formerly admitted in the lord's court (as is still the practice in Scotland) and there received his seisin, in the nature of a renewal of his ancestor's grant, in the presence of the feudal peers: till at length, when the right of succession became indefeasible, an entry on any part of the lands within the county (which if disputed was afterwards to be tried by those peers), or other notorious possession, was admitted as equivalent to the formal grant of seisin, and made the tenant capable of transmitting his estate by descent. The seisin therefore of any person, thus understood, makes him the root or stock, from which all future inheritance by right of blood must be derived: which is very briefly expressed in this maxim, *seisina facit stipitem* (r).

*When therefore a person dies so seised, the inheritance first goes to his issue: as if there be Geoffrey, John, and Matthew, grandfather, father, and son; and John purchases lands, and dies; his son Matthew shall succeed him as heir, and not the grandfather Geoffrey: to whom the land shall never ascend, but shall rather escheat to the lord(s) (15).

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Where there is none that can take by descent, the land escheats to the lord.

(r) Flet. 1. 6, c. 2, s. 2.

(s) Litt. s. 3.

(14) See *ante*, p. 54, note.

(15) Our author tells us, that the negative part of this canon is "founded on good *legal* reason;" but, it is conceived, that hardships equally repugnant to common feeling and to common sense may flow from it. By its operation, if any one dies intestate, without issue, (or kinsmen of the whole blood,) but leaving a father, (and, perhaps, a numerous family of brothers and sisters by the same father, but by a different mother,) his lands must escheat. If the same person had left an uncle him surviving, that uncle might have succeeded to the inheritance, and then the father might, eventually, as heir to the uncle, by a

precious involution, have taken that which he could not derive from his own son. (See *ante*, the note to p. 13.) Ought such a canon to be retained? Even if it were admitted, (and see *ante*, p. 11, note, that it is a dictum which may at least be questioned,) that "all rules of succession to estates are creatures of civil polity and *juris positivi* merely;" still it should seem sophistical thence to argue, that rules established in support of one system of civil polity ought to be held sacred, when that system has given way to another, under which, whatever convenience (real or supposed) there may once have been in those rules, *that* has ceased; but the harsh and painful con-

The nature of this rule of inheritance considered.

This rule, so far as it is affirmative and relates to lineal descents, is almost universally adopted by all nations; and it seems founded on a principle of natural reason, that (whenever a right of property transmissible to representatives is admitted) the possessions of the parents should go, upon their decease, in the first place to their children, as those to whom they have given being, and for whom they are therefore bound to provide. But the negative branch, or total exclusion of parents and all lineal ancestors from succeeding to the inheritance of their offspring, is peculiar to our own laws, and such as have been deduced from the same original. For, by the Jewish law, on failure of issue, the father succeeded to the son, in exclusion of brethren, unless one of them married the widow and raised up seed to his brother (*t*). And by the laws of Rome, in the first place, the children or lineal descendants were preferred; and on failure of these, the father and mother or lineal ascendants succeeded together with the brethren and sisters (*v*); though by the law of the twelve tables the mother was

(*t*) Seld. de Success. Ebraeor. c. 12.

(*v*) Ff. 38, 15; 1 Nov. 118, 127.

sequences, and those alone, remain in full operation. It is certainly competent to the municipal law of any country to mark out the path of descent; but, as certainly, (notwithstanding our author's opposite declaration and able apology,) injustice is done to individuals when the line is arbitrarily traced, so as to violate private natural feelings, without thereby securing an equivalent public advantage. The feudal rule in question, as our author fairly acknowledges, is not only in opposition to the Jewish law, and to the refined code of Roman jurisprudence, but also to our own old Saxon laws: and it would be very difficult to prove the utility of preserving some disjointed fragments of feudality, merely because they may possibly have contributed to the strength, or even have been essential compotent parts of the feudal edifice, whilst that was entire. The devolution of personal property is directed by rules to which, generally

speaking, unsophisticated reason and natural feeling willingly subscribe: (see *post*, chapter 32, pp. 515 *et seq.*;) why should the descent of real property be controlled by another and very different set of rules? It is not asked why these latter ever were established; the occasion of their introduction we have learned from our author's fourth, fifth, and sixth chapters, and it may be admitted they were necessary to support in its vigour the system of feudal tenure; but, why are they allowed still to disfigure our code of laws regulating the descent of real property?

It is hoped that the commissioners now engaged in an investigation of the laws of real property, to whose attention the present writer has taken the liberty of proposing this subject, will think it deserving notice.

This hope has, since the first publication of this note been realized, and the law of inheritance amended, by the statute of 3 & 4 Gul. IV. c. 106.

originally, on account of her sex, excluded (*u*). Hence this rule of our laws has been censured and declaimed against, as absurd and derogating from the maxims of equity and natural justice (*w*). Yet that there is nothing unjust or absurd in it, but that on the contrary it is founded upon very good legal reason, may appear from considering as well the nature of the rule itself, as the occasion of introducing it into our laws.

*We are to reflect, in the first place, that all rules of succession to estates are creatures of the civil polity, and *juris positivi* merely (16). The right of property, which is gained by occupancy, extends naturally no farther than the life of the present possessor: after which the land by the law of nature would again become common and liable to be seized by the next occupant; but society, to prevent the mischiefs that might ensue from a doctrine so productive of contention, has established conveyances, wills, and successions; whereby the property originally gained by possession is continued and transmitted from one man to another, according to the rules which each state has respectively thought proper to prescribe. There is certainly therefore no injustice done to individuals, whatever be the path of descent marked out by the municipal law.

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Its propriety.

If we next consider the time and occasion of introducing this rule into our law, we shall find it to have been grounded upon very substantial reasons. I think there is no doubt to be made, but that it was introduced at the same time with, and in consequence of, the feudal tenures. For it was an express rule of the feudal law (*x*), that *successionis feudalis est natura, quod ascendentes non succedunt*; and therefore the same maxim obtains also in the French law to this day (*y*). Our Henry the first indeed, among other restorations of the old Saxon laws, restored the right of succession in the ascending line (*z*): but this soon fell again into disuse; for so early as Glanvil's time, who wrote under Henry the second, we find it laid down as established

The time and occasion of its introduction into our law.

(*u*) Inst. 3. 3. 1.

(*y*) Domat. p. 2, l. 2, t. 2; Montesq.

(*w*) Craig. de jur. Feud. l. 2, t. 13, Esp. L. l. 31, c. 33.

s. 15; Locke on Gov. part 1, s. 90.

(*z*) LL. Hen I. c. 70.

(*x*) 2 Feud. 50.

(16) But see *ante*, p. 13, note.

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law (a), that *hæreditas nunquam ascendit*; which has remained an invariable maxim ever since. These circumstances evidently show this rule to be of feodal original; and taken in that light, there are some arguments in its favour, besides those which are drawn *merely from the reason of the thing. For if the feud of which the son died seised, was really *feudum antiquum*, or one descended to him from his ancestors, the father could not possibly succeed to it, because it must have passed him in the course of descent, before it could come to the son; unless it were *feudum maternum*, or one descended from his mother; and then, for other reasons (which will appear hereafter), the father could in no wise inherit it. And if it were *feudum novum*, or one newly acquired by the son, then only the descendants from the body of the feudatory himself could succeed, by the known maxim of the early feodal constitutions (b); which was founded as well upon the personal merit of the vassal, which might be transmitted to his children, but could not ascend to his progenitors, as also upon this consideration of military policy, that the decrepid grandsire of a vigorous vassal would be but indifferently qualified to succeed him in his feodal services. Nay, even if this *feudum novum* were held by the son *ut feudum antiquum* (17), or with all the qualities annexed to a feud descended from his ancestors, such feud must in all respects have descended as if it had been really an ancient feud; and therefore could not go to the father, because, if it had been an ancient feud, the father must have been dead before it could have come to the son. Thus, whether the feud was strictly *novum* or strictly *antiquum*, or whether it was *novum* held *ut antiquum*, in none of these cases the father could possibly succeed. These reasons, drawn from the history of the rule itself, seem to be more satisfactory than that quaint one of Bracton (c), adopted by Sir Edward Coke (d), which regulates the descent of lands according to the laws of gravitation (18).

(a) L. 7. c. 1.

(b) 1 Feud. 20.

(c) *Descendit itaque jus, quasi pon-**derosum quid cadens deorsum recta linea, et nunquam reascendit.* l. 2, c. 29.

(d) 1 Inst. 11.

(17) See *post*, the note to p. 222.

(18) Mr. Christian observes, that

“however ingenious and satisfactory these reasons may appear, there is

II. A second general rule or canon is, that the male issue shall be admitted before the female.

II. The male issue admitted before the female.

*Thus sons shall be admitted before daughters; or, as our male lawgivers have somewhat uncomplaisantly expressed it, the worthiest of blood shall be preferred (*e*). As if John Stiles hath two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; first Matthew, and (in case of his death without issue) then Gilbert, shall be admitted to the succession, in preference to both the daughters.

Sons before daughters.

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This preference of males to females is entirely agreeable to the law of succession among the Jews (*f*), and also among the states of Greece, or at least among the Athenians (*g*); but was totally unknown to the laws of Rome (*h*), (such of them I mean as are at present extant,) wherein brethren and sisters were allowed to succeed to equal portions of the inheritance. I shall not here enter into the comparative merit of the Roman and the other constitutions in this particular, nor examine into the greater dignity of blood in the male or female sex: but shall only observe, that our present preference of males to females seems to have arisen entirely from the feudal law. For though our British ancestors, the Welsh, appear to have given a preference to males (*i*), yet our Danish predecessors (who succeeded them) seem to have made no distinction of sexes, but to have admitted all the children at once to the inheritance (*k*). But the feudal law of the Saxons on the continent (which was probably brought over hither, and first altered by the law of king Canute) gives an evident preference of the male to the

The reason of this preference.

(*e*) 2 Hal. H. C. L. 76, 78.

(*i*) Stat. Wall. 12 Edw. I.

(*f*) Numb. c. 27.

(*k*) LL. Canut. c. 68. [2 Hale's C.

(*g*) Petit. LL. Attic. l. 6, t. 6.

L. 96, 99.]

(*h*) Inst. 3. l. 6.

little consistency in the application of them; for if the father does not succeed to the estate, because it must be presumed that it has passed him in the course of descent, the same reason would prevent an elder brother from taking an estate by descent from the younger. And if it does not pass to the father, lest the lord should have

been attended by an aged decrepid feudatory, the same principle would be still stronger to exclude the father's eldest brother from the inheritance, who is now permitted to succeed to his nephew. [See, now, the statute cited *ante*, in note to p. 200. —ED.]

female sex. “*Pater aut mater defuncti, filio non filiae hæ-reditatem relinquent. Qui defunctus non filios sed filias reliquerit, ad eas omnis hæreditas pertineat*” (l). It is possible, therefore, that this preference might be a branch of that imperfect system of feuds, which obtained here before the conquest: especially as it subsists among the customs of gavelkind, and as, in the *charter or laws of king Henry the first, it is not (like many Norman innovations) given up, but rather enforced (m). The true reason of preferring the males must be deduced from feudal principles: for, by the genuine and original policy of that constitution, no female could ever succeed to a proper feud (n), inasmuch as they were incapable of performing those military services, for the sake of which that system was established. But our law does not extend to a total exclusion of females, as the Salic law, and others, where feuds were most strictly retained: it only postpones them to males; for, though daughters are excluded by sons, yet they succeed before any collateral relations; our law, like that of the Saxon feudists before mentioned, thus steering a middle course, between the absolute rejection of females, and the putting them on a footing with males.

III. Of males, the eldest only shall inherit; but females, all together.

III. A third rule or canon of descent is this: that where there are two or more males, in equal degree, the eldest only shall inherit; but the females all together.

As if a man hath two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; Matthew, his eldest son, shall alone succeed to his estate, in exclusion of Gilbert, the second son, and both the daughters; but, if both the sons die without issue before the father, the daughters Margaret and Charlotte shall both inherit the estate as coparceners (o) (19).

The origin of the right of primogeniture in males.

This right of primogeniture in males seems anciently to have only obtained among the Jews, in whose constitution the eldest son had a double portion of the inheritance (p); in the same manner as with us, by the laws of king Henry

(l) Tit. 7, s. 1 & 4,

(m) C. 70.

(n) 1 Feud. 8.

(o) Litt. s. 5; Hale, H. C. L. 238.

(p) Selden, de succ. Ebr. c. 5.

(19) See ante, the note to p. 187.

the first (*q*), the eldest son had the capital fee or principal feud of his father's possessions, and no other pre-eminence; and *as the eldest daughter had afterwards the principal mansion, when the estate descended in coparcenary (*r*). The Greeks, the Romans, the Britons, the Saxons, and even originally the feudists, divided the lands equally; some among all the children at large, some among the males only. This is certainly the most obvious and natural way; and has the appearance, at least in the opinion of younger brothers, of the greatest impartiality and justice. But when the emperors began to create honorary feuds, or titles of nobility, it was found necessary (in order to preserve their dignity) to make them impartible (*s*) (20), or (as they stiled them) *feuda individua*, and in consequence descendible to the eldest son alone. This example was farther enforced by the inconveniences that attended the splitting of estates; namely, the division of the military services, the multitude of infant tenants incapable of performing any duty, the consequential weakening of the strength of the kingdom, and the inducing younger sons to take up with the business and idleness of a country life, instead of being serviceable to themselves and the public, by engaging in mercantile, in military, in civil, or in ecclesiastical employments (*t*). These reasons occasioned an almost total change in the method of feudal inheritances abroad; so that the eldest male began universally to succeed to the whole of the lands in all military tenures: and in this condition the feudal constitution was established in England by William the conqueror (21).

Yet we find, that socage estates frequently descended to all the sons equally, so lately as when Glanvil (*u*) wrote in the reign of Henry the second; and it is mentioned in the Mirror (*w*), as a part of our ancient constitution, that knights' fees should descend to the eldest son, and socage fees should be partible among the male children. However, in Henry the third's time, we find by Bracton (*x*), that socage lands,

Exceptions to
this rule.

(*q*) C. 70.

(*r*) Glanvil, l. 7, c. 3.

(*s*) 2 Feud. 55.

(*t*) 2 Hale, H. C. L. 101, 103, 109.

(*u*) L. 7, c. 3.

(*w*) C. 1, s. 3.

(*x*) L. 2, c. 30, 31.

(20) See *ante*, pp. 48, 190, with the notes thereto.

(21) See *ante*, chapter 6, pp. 84, 85, and the notes thereto.

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in imitation of lands in chivalry, had almost entirely fallen into the right of succession by primogeniture, as the law now stands: *except in Kent, where they gloried in the preservation of their ancient gavelkind tenure, of which a principal branch was the joint inheritance of all the sons (*y*); and except in some particular manors and townships, where their local customs continued the descent, sometimes to all, sometimes to the youngest son only (22), or in other more singular methods of succession.

Cases in which the right of sole succession and primogeniture amongst females obtained.

As to the females, they are still left as they were by the ancient law: for they were all equally incapable of performing any personal service; and therefore one main reason of preferring the eldest ceasing, such preference would have been injurious to the rest: and the other principal purpose, the prevention of the too minute subdivision of estates, was left to be considered and provided for by the lords, who had the disposal of these female heiresses in marriage. However, the succession by primogeniture, even among females, took place as to the inheritance of the crown (*z*); wherein the necessity of a sole and determinate succession is as great in the one sex as the other. And the right of sole succession, though not of primogeniture, was also established with respect to female dignities and titles of honour. For, if a man holds an earldom to him and the heirs of his body, and dies, leaving only daughters; the eldest shall not of course be countess, but the dignity is in suspense or abeyance till the king shall declare his pleasure (23); for he, being the fountain of honour, may confer it on which of them he pleases (*a*). In which disposition is preserved a strong trace of the ancient law of feuds, before their descent by primogeniture even among the males was established; namely, that the lord might bestow them on which of the sons he thought proper—“*progressum est ut ad filios deveniret, in quem scilicet dominus hoc vellet beneficium confirmare*” (*b*).

IV. The lineal descendants, in

IV. A fourth rule, or canon of descents, is this: that the

(*y*) Somner, Gavelk. 7.

(*z*) Co. Litt. 165.

(*a*) Co. Litt. 165.

(*b*) 1 Feud. 1.

(22) See *ante*, chapter 6, p. 83, and the note thereto.

(23) See *ante*, note to p. 190.

lineal descendants, *in infinitum*, of any person deceased *in infinitum*, represent the ancestor. *shall represent their ancestor: that is, shall stand in the same place as the person himself would have done, had he been living (24). [* 217]

Thus, the child, grandchild, or great-grandchild, either male or female, of the eldest son, succeeds before the younger son, and so *in infinitum* (c). And these representatives shall neither take more or less, but just so much as their principals would have done. As, if there be two sisters, Margaret and Charlotte; and Margaret dies, leaving six daughters; and then John Stiles, the father of the two sisters, dies, without other issue: these six daughters shall take among them exactly the same as their mother Margaret would have done, had she been living; that is, a moiety of the lands of John Stiles in coparcenary: so that, upon partition made, if the land be divided into twelve parts, thereof Charlotte the surviving sister shall have six, and her six nieces, the daughters of Margaret, one a piece. The child, grandchild, or great-grandchild of the eldest son takes before the younger son, &c.

This taking by representation is called succession *in stirpes*, according to the roots; since all the branches inherit the same share that their root, whom they represent, would have done. And in this manner also was the Jewish succession directed (d); but the Roman somewhat differed from it. In the descending line, the right of representation continued *in infinitum*, and the inheritance still descended *in stirpes*: as, if one of three daughters died, leaving ten children, and then the father died; the two surviving daughters had each one third of his effects, and the ten grandchildren had the remaining third divided between them. And so among collaterals, if any person of equal degree with the persons represented were still subsisting (as, if the deceased left one brother, and two nephews, the sons of another brother), the succession was still guided by the roots: but, if both the brethren were dead leaving issue, then, I apprehend, their representatives in equal degree became themselves principals, *and shared the inheritance [* 218]

(c) Hale, H. C. L. 236, 237.

(d) Selden, de succ. Ebr. c. 1. [2 Hale's C. L. 119.]

(24) This right of representation equally takes place in descents of gavelkind and borough english land, and copyholds in the nature of those tenures. (*Clements v. Scudamore*, 2 Lord Raym. 1024, 1026; *S. C.* 1 P. Wms. 65; *Blackburn v. Graves*, 1 Mod. 102.)

per capita, that is, share and share alike; they being themselves now the next in degree to the ancestor, in their own right, and not by right of representation(*e*). So, if the next heirs of Titius be six nieces, three by one sister, two by another, and one by a third; his inheritance by the Roman law was divided into six parts, and one given to each of the nieces: whereas the law of England in this case would still divide it only into three parts, and distribute it *per stirpes*, thus: one third to the three children who represent one sister, another third to the two who represent the second, and the remaining third to the one child who is the sole representative of her mother.

which is a necessary consequence of the preference given by our law to males, and to the first-born among males.

This mode of representation is a necessary consequence of the double preference given by our law, first to the male issue, and next to the first-born among the males, to both which the Roman law is a stranger. For, if all the children of three sisters were in England to claim *per capita*, in their own right as next of kin to the ancestor, without any respect to the stocks from whence they sprung, and those children were partly male and partly female; then the eldest male among them would exclude not only his own brethren and sisters, but all the issue of the other two daughters; or else the law in this instance must be inconsistent with itself, and depart from the preference which it constantly gives to the males, and the first-born, among persons in equal degree. Whereas, by dividing the inheritance according to the roots, or *stirpes*, the rule of descent is kept uniform and steady: the issue of the eldest son excludes all other pretenders, as the son himself (if living) would have done; but the issue of two daughters divide the inheritance between them, provided their mothers (if living) would have done the same: and among these several issues, or representatives of the respective roots, the same preference to males and the same right of primogeniture obtain, as would have obtained at the first among the roots themselves, the sons or daughters of the deceased. As, if a man hath two sons, A. and B., and A. dies leaving two *sons, and then the grandfather dies; now the eldest son of A. shall succeed to the whole of his grandfather's estate: and if A. had left only two daughters, they should have succeeded also to equal moieties of the whole, in exclusion of B. and his issue. But, if a man hath

(*e*) Nov. 110, c. 3; Inst. 3, l. 6.

only three daughters, C., D., and E.; and C. dies leaving two sons, D. leaving two daughters, and E. leaving a daughter and a son who is younger than his sister: here, when the grandfather dies, the eldest son of C. shall succeed to one third, in exclusion of the younger; the two daughters of D. to another third in partnership; and the son of E. to the remaining third, in exclusion of his elder sister. And the same right of representation, guided and restrained by the same rules of descent, prevails downwards *in infinitum*.

Yet this right does not appear to have been thoroughly established in the time of Henry the second, when Glanvil wrote: and therefore, in the title to the crown especially, we find frequent contests between the younger (but surviving) brother and his nephew (being the son and representative of the elder deceased) in regard to the inheritance of their common ancestor: for the uncle is certainly nearer of kin to the common stock, by one degree, than the nephew; though the nephew, by representing his father, has in him the right of primogeniture. The uncle also was usually better able to perform the services of the fief; and besides had frequently superior interest and strength, to back his pretensions and crush the right of his nephew. And even to this day, in the lower Saxony, proximity of blood takes place of representative primogeniture; that is, the younger surviving brother is admitted to the inheritance before the son of an elder deceased: which occasioned the disputes between the two houses of Mecklenburg Schwerin and Strelitz, in 1692 (*f*). Yet Glanvil, with us, even in the twelfth century, seems (*g*) to declare for the right of the nephew by representation; provided the eldest son had not received a provision in lands from his father, (or as the civil law would call it) had not been *foris-familiated, in his lifetime. King John, however, who kept his nephew Arthur from the throne, by disputing this right of representation, did all in his power to abolish it throughout the realm (*h*): but in the time of his son, king Henry the third, we find the rule indisputably settled in the manner we have here laid it down (*i*), and so it has continued ever since. And thus much for lineal descents.

Of the time at which this rule appears to have been permanently settled.

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V. A fifth rule is, that on failure of lineal descendants,

V. On failure of lineal descend-

(*f*) Mod. Un. Hist. xlii. 334.

(*h*) 2 Hale, H. C. L. 93, 109, 120.

(*g*) L. 7, c. 3.

(*i*) Bracton, l. 2, c. 30, s. 2.

ants of the person last seised, the inheritance shall descend to the blood of the first purchasor.

or issue, of the person last seised, the inheritance shall descend to his collateral (25) relations, being of the blood of the first purchasor; subject to the three preceding rules.

Thus, if Geoffrey Stiles purchases land, and it descends to John Stiles his son, and John dies seised thereof without issue; whoever succeeds to this inheritance must be of the blood of Geoffrey the first purchasor of this family (*k*) (26). The first purchasor, *perquisitor*, is he who first acquired the estate to his family, whether the same was transferred to him by sale or by gift, or by any other method, except only that of descent.

Origin of this rule.

This is a rule almost peculiar to our own laws, and those of a similar original. For it was entirely unknown among the Jews, Greeks, and Romans: none of whose laws looked any farther than the person himself who died seised of the estate; but assigned him an heir, without considering by what title he gained it, or from what ancestor he derived it. But the law of Normandy (*l*) agrees with our law in this

(*k*) Co. Litt. 12.

(*l*) Gr. Coustum, c. 25.

(25) The custom of *gavelkind* extends to collaterals; so that, if one brother die without issue, *all* his other brothers shall succeed equally. (Robins. on Gavelk. book i. ch. 6.) But, the custom of *borough English* does not extend to collaterals; and therefore, on the death of one brother, lands of that tenure shall not go to the youngest brother, without a special custom. (Ibid.) It is probable, however, that tenures in *gavelkind* and in *borough English* will be abolished during the present session (1836). A bill has been introduced into the House of Commons, the object of which is to enact, that all freehold lands now held subject to customary modes of descent, shall, hereafter, be held in free and common socage.

(26) Mr. Christian observes, that "to be of the blood of Geoffrey, is either to be immediately descended from him, or to be descended from the same couple of common ancestors. Two persons are *consanguinei*, or are

of the blood (that is, whole blood) of each other, who are descended from the same two ancestors.

"The heir and ancestor must not only have two common ancestors with the original purchasor of the estate, but must have two common ancestors with each other; and therefore, if the son purchases lands, and dies without issue, and it descends to any heir on the part of the father, if the line of the father should afterwards become extinct, it cannot pass to the line of the mother. (Hale's Hist. C. L. 246; 49 E. 3, 12.) And, for the same reason, if it should descend to the line of any female, it can never afterwards, upon failure of that line, be transmitted to the line of any other female; for, according to the next rule, *viz.* the sixth, the heir of the person last seised must be a collateral kinsman of the whole blood."

[But now, as to this last point, see the statute cited *ante*, in the note to p. 200.—ED.]

respect: nor indeed is that agreement to be wondered at, since the law of descents in both is of feudal original; and this rule or canon cannot otherwise be accounted for than by recurring to feudal principles.

When feuds first began to be hereditary, it was made a necessary qualification of the heir, who would succeed to a feud, that he should be of the blood of, that is, lineally descended from, the first feudatory or purchasor. In consequence whereof, if a vassal died seised of a feud of his own

Formerly, it was requisite that the party succeeding to a feud should be lineally descended from the first feudatory;

acquiring, or *feudum novum*, it could not descend to any but his own offspring; no, not even to his brother, because he was not descended, nor derived his blood, from the first acquirer. But if it was *feudum antiquum*, that is, one descended to the vassal from his ancestors, then his brother, or such other collateral relation as was descended and derived his blood from the first feudatory, might succeed to such inheritance. To this purpose speaks the following rule: "*frater fratri, sine legitimo hærede defuncto, in beneficio quod eorum patris fuit, succedat: sin autem unus e fratribus a domino feudum acceperit, eo defuncto sine legitimo hærede, frater ejus in feudum non succedit*" (m). The true feudal reason for which rule was this: that what was given to a man, for his personal service and personal merit, ought not to descend to any but the heirs of his person. And therefore, as in estates-tail, (which a proper feud very much resembled,) so in the feudal donation, "*nomen hæredis, in prima investitura expressum, tantum ad descendentes ex corpore primi vasalli extenditur; et non ad collaterales, nisi ex corpore primi vasalli sive stipitis descendant*" (n): the will of the donor, or original lord, (when feuds were turned from life estates into inheritances,) not being to make them absolutely hereditary, like the Roman *allodium*, but hereditary only *sub modo*; not hereditary to the collateral relations, or lineal ancestors, or husband, or wife of the feudatory, but to the issue descended from his body only.

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However, in process of time, when the feudal rigour was in part abated, a method was invented to let in the collateral relations of the grantee to the inheritance, by granting him a *feudum novum* to hold *ut feudum antiquum*;

but, in process of time, collateral relations were admitted.

(m) 1 Feud. 1, s. 2.

(n) Crag. l. 1, t. 9, s. 36.

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that is, with all the qualities annexed of a feud derived from his ancestors; and then the collateral relations were admitted to succeed even *in infinitum*, because they might have been of the blood of, that is descended from, the first imaginary purchasor. For, *since it is not ascertained in such general grants, whether this feud shall be held *ut feudum paternum*, or *feudum avitum*, but *ut feudum antiquum* merely; as a feud of indefinite antiquity; that is, since it is not ascertained from which of the ancestors of the grantee this feud shall be supposed to have descended; the law will not ascertain it, but will suppose *any* of his ancestors, *pro re nata*, to have been the first purchasor: and therefore it admits *any* of his collateral kindred (who have the other necessary requisites) to the inheritance, because every collateral kinsman must be descended from some one of his lineal ancestors.

The nature of all grants of fee-simple estates in this kingdom.

Of this nature are all the grants of fee-simple estates of this kingdom; for there is now in the law of England no such thing as a grant of a *feudum novum*, to be held *ut novum* (27); unless in the case of a fee-tail, and there we see that this rule is strictly observed, and none but the lineal descendants of the first donee (or purchasor) are admitted; but every grant of lands in fee-simple is with us a *feudum novum* to be held *ut antiquum*, as a feud whose antiquity is indefinite: and therefore the collateral kindred of the grantee, or descendants from any of his lineal ancestors, by

(27) Mr. Preston, (in his Treat. on Est. Vol. I. p. 469,) qualifies the *dictum* in the text. Mr. Preston puts the case of a conveyance to a man who is a bastard, and who cannot, according to our law, be supposed to have any blood of inheritance in him: (see *post*, p. 247:) yet he may purchase a fee; and is he to hold it *ut feudum antiquum*? He can have no collateral kindred, (recognized as such by law,) nor any descendants from any lineal ancestors, to be benefited by the fiction. (See the next note, and *post*, p. 249.) Can a feud be presumed to have descended *paternally* (which is the presumption as to every feud taken *ut antiquum*, see Watk. on Desc. 168,)

when it is purchased by one whom the law holds to be *nullius filius*?

Since this note was first published, the statute of 3 & 4 Gul. IV. c. 106, has been passed, for the amendment of the law of inheritance. By the second section of that statute it is enacted, that the person last entitled to any lands shall be considered to have been the purchaser thereof, unless the contrary be proved: and if such proof is given, then the last person from whom the land shall be proved to have been inherited shall be considered to have been the purchaser. This puts an end to the fiction of *feuda nova* to be holden *ut antiqua*.

whom the lands might have possibly been purchased, are capable of being called to the inheritance.

Yet, when an estate hath really descended in a course of inheritance to the person last seised, the strict rule of the feudal law is still observed; and none are admitted, but the heirs of those through whom the inheritance hath passed: for all others have demonstrably none of the blood of the first purchasor in them, and therefore shall never succeed. As, if lands come to John Stiles by descent from his mother Lucy Baker, no relation of his father (as such) shall ever be his heir of these lands; and *vice versâ*, if they descended from his father Geoffrey Stiles, no relation of his mother (as such) shall ever be admitted thereto; for his father's kindred have none of his mother's blood, nor have his mother's relations any share of his father's blood. And so, if the estate descended from his father's father, George Stiles, the relations of *his father's mother, Cecilia Kempe, shall for the same reason never be admitted, but only those of his father's father (28). This is also the rule of the French law (o), which is derived from the same feudal fountain.

When an estate has descended in a course of inheritance to the person last seised, the strict rule of the feudal law is still observed.

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Here we may observe, that so far as the feud is really *antiquum*, the law traces it back, and will not suffer any to inherit but the blood of those ancestors, from whom the feud was conveyed to the late proprietor. But when, through length of time, it can trace it no farther; as, if it be not known whether his grandfather, George Stiles, inherited it from his father, Walter Stiles, or his mother, Christian Smith; or, if it appear that his grandfather was the first grantee, and so took it (by the general law) as a feud of indefinite antiquity; in either of these cases the law admits the descendants of any ancestor of George Stiles, either paternal or maternal, to be in their due order the heirs to John

Where the feud is really *antiquum*, none can inherit but the blood of the ancestors from whom it was conveyed to the late proprietor.

(o) Domat, part 2, pr.

(28) Mr. Christian observes, that "hence the expression *heir at law*, must always be used with a reference to a specific estate; for, if an only child has taken by descent an estate from his father, and another from his mother, upon his death without issue, these estates will descend to two dif-

ferent persons: so also, if his two grandfathers and two grandmothers had each an estate, which descended to his father or mother, whom I suppose also to be only children, then, as before, these four estates will descend to four different heirs."

Stiles of this estate; because, in the first case, it is really uncertain, and, in the second case, it is supposed to be uncertain, whether the grandfather derived his title from the part of his father or his mother.

The general principle upon which the law of collateral inheritances depends.

This then is the great and general principle, upon which the law of collateral inheritances depends; that, upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchasor; or, that it shall result back to the heirs of the body of that ancestor from whom it either really has, or is supposed by fiction of law to have originally descended: according to the rule laid down in the year books (*p*), Fitzherbert (*q*), Brook (*r*), and Hale (*s*), "that he who would have been heir to the father of the deceased" (and, of course, to the mother, or any other real or supposed purchasing ancestor) "shall also be heir to the son;" a maxim, that will hold universally, except in the case of a brother or sister of the half blood, which exception (as we shall see hereafter) depends upon very special grounds.

[* 224] The rules of inheritance that remain are only rules of evidence, calculated to investigate who the purchasing ancestor was; which **in feudis vere antiquis* has in process of time been forgotten, and is supposed so to be in feuds that are held *ut antiquis*.

VI. The collateral heir of the person last seised must be his next collateral kinsman, of the whole blood;

VI. A sixth rule or canon therefore is, that the collateral heir of the person last seised must be his next collateral kinsman, of the whole blood (29).

(*p*) M. 12 Edw. IV. 14.

(*q*) Abr. t. Discent, 2.

(*r*) Ibid. 38.

(*s*) H. C. L. 243.

(29) There is obvious injustice in one of the consequences deduced from that legal fiction, by which lands held in fee-simple, however notorious their recent purchase, are considered as a feud of which the antiquity is indefinite. The exclusion, in every case, indiscriminately, of the half blood of the party last seised, by the adoption of this doctrine, is a barbarous grievance; its most anxious apologists, (at the head of whom, in point of ability, our author may be ranked,) are compelled to admit, that the doctrine de-

pends altogether upon "a very fine-spun and subtle nicety," and that, "in some instances, the practice is carried further than even the principle upon which it goes will warrant." It is so, indeed; for, if it be true, that "it is a misapprehension to consider the exclusion of the half blood in the light of a rule of descent, when it is rather a rule of evidence;" what must we think of that rule, as a rule of evidence, forsooth, which frequently operates in direct opposition to certain and notorious fact, and to actual de-

First, he must be his next collateral kinsman, either personally or *jure representationis* (30); which proximity is reckoned according to the canonical degrees of consanguinity before mentioned. Therefore, the brother being in the first degree, he and his descendants shall exclude the uncle and his issue, who is only in the second. And herein consists the true reason of the different methods of computing the degrees of consanguinity (31), in the civil law on the one hand, and in the canon and common laws on the other. The civil law regards consanguinity principally with respect to successions, and therein very naturally considers only the person deceased, to whom the relation is claimed: it therefore counts the degrees of kindred according to the number of persons through whom the claim must be derived from him; and makes not only his great nephew but also his first cousin to be both related to him in the fourth degree; because there are three persons between him and each of them. The canon law regards consanguinity principally with a view to prevent incestuous marriages, between those who have a large portion of the same blood running in their respective veins; and therefore looks up to the author of that blood, or the common ancestor, reckoning the degrees

either personally
or *jure represen-*
tationis.

monstration of the thing to be proved? An absurdity so gross, and which so often produces results of the most distressing kind, is an opprobrium that ought, surely, to be removed; even if, in adherence to feudal principles, and in order to keep estates in a line of descent from the first purchaser, a rule of probability should still be held sufficient to exclude the half blood, whenever that probability is not refuted. But it may be safely contended, the exclusion of the half blood from the right of inheritance, and the preference of a remote kinsman of the whole blood, is, at the present day, altogether a wanton hardship: it had a meaning when applied to effect feudal purposes; but its advantages, such as they were, ceased when the feudal system was overthrown: continued adherence to a collateral rule framed in support of that system, and

only applicable with propriety thereto, is, in the present state of society, a discredit to our legal code. (See *post*, the note to p. 228.)

The present writer has submitted this question to the consideration of the commission sitting for the investigation of the law of real property. (See *ante*, p. 210, note.)

The grievances complained of in this note have been removed since its first publication, by the statute of 3 & 4 Gul. IV. c. 106.

(30) Mr. Christian says, "this is only true in the paternal line; for, when the paternal and maternal lines are both admitted to the inheritance, the most remote collateral kinsman *ex parte paternâ*, will inherit before the nearest *ex parte maternâ*. See p. 236, *post*."

(31) See *ante*, pp. 206, 207, and the notes thereto.

from him: so that the great nephew is related in the third canonical degree to the person proposed, and the first cousin in the second; the former being distant three degrees from the common ancestor, (the father of the *propositus*,) and therefore deriving only one fourth of his blood from the same fountain; the latter, and also the *propositus* himself, being each of them distant only two degrees from the common ancestor (the grandfather of each), and therefore having one half of each of their bloods the same. The common law regards consanguinity principally with respect to descents; and, having therein the same

[* 225] object in view as the civil, it may seem as if it ought *to proceed according to the civil computation. But, as it also respects the purchasing ancestor, from whom the estate was derived, it therein resembles the canon law, and therefore counts its degrees in the same manner. Indeed, the designation of person, (in seeking for the next of kin,) will come to exactly the same end, (though the degrees will be differently numbered,) whichever method of computation we suppose the law of England to use; since the right of representation, of the parent by the issue, is allowed to prevail *in infinitum* (32). This allowance was absolutely necessary, else there would have frequently been many claimants in exactly the same degree of kindred; as, for instance, uncles and nephews of the deceased; which multiplicity, though no material inconvenience in the Roman law of partible inheritances, yet would have been productive of endless confusion where the right of sole succession, as with us, is established. The issue or descendants therefore of John Stiles's brother are all of them in the first degree of kindred with respect to inheritances, those of his uncle in

(32) Mr. Christian conceives, that "the true and only way of ascertaining an heir-at-law in any line or branch, is by the representation of brothers or sisters in each generation, and that the introduction of the computation of kindred, either by the canon or civil law, into a treatise upon descents, may perplex and can never assist; for if we refer this sixth rule either to the civil or canon law, it will in many instances be erroneous. It

is certain that a great-grandson of the father's brother will inherit before a son of the grandfather's brother; yet the latter is the *next collateral kinsman* according to both the canon and civil computation; for the former is in the fourth degree by the canon, and the sixth by the civil law; the latter is in the third by the canon, and the fifth by the civil; but in the descent of real property the former must be preferred."

the second, and those of his great uncle in the third; as their respective ancestors, if living, would have been; and are severally called to the succession in right of such their representative proximity.

The right of representation being thus established, the former part of the present rule amounts to this; that, on failure of issue of the person last seised, the inheritance shall descend to the other subsisting issue of his next immediate ancestor. Thus, if John Stiles dies without issue, his estate shall descend to Francis his brother, or his representatives; he being lineally descended from Geoffrey Stiles, John's next immediate ancestor or father. On failure of brethren or sisters, and their issue, it shall descend to the uncle of John Stiles, the lineal descendant of his grandfather George, and so on *in infinitum*. Very similar to which was the law of inheritance among the ancient Germans, our progenitors: "*hæredes successoresque, sui cuique liberi, et nullum testamentum: si liberi non sunt, proximus gradus in possessione, fratres, patru, avunculi*" (t).

On failure of issue of the person last seised, the inheritance shall descend to the issue of his next immediate ancestor.

*Now here, it must be observed, that the lineal ancestors, though (according to the first rule,) incapable themselves of succeeding to the estate, because it is supposed to have already passed them, are yet the common stocks from which the next successor must spring. And therefore, in the Jewish law, which in this respect entirely corresponds with ours (u), the father or other lineal ancestor is himself said to be the heir, though long since dead, as being represented by the persons of his issue; who are held to succeed not in their own rights, as brethren, uncles, &c., but in right of representation, as the offspring of the father, grandfather, &c. of the deceased (w). But, though the common ancestor be thus the root of the inheritance, yet with us it is not necessary to name him in making out the pedigree or descent. For the descent between two brothers is held to be an *immediate* descent; and therefore title may be made by one brother or his representatives *to* or *through* another, without mentioning their common father (x) (33). If Geoffrey

The lineal ancestors, though incapable themselves of inheriting, are yet the common stock from which the next ancestor must spring.

[* 226]

(t) Tacitus, de mor. Germ. 21.

(x) 1 Sid. 196; 1 Ventr. 423; 1

(u) Numb. c. 27.

Lev. 60; 12 Mod. 619.

(w) Selden de succ. Ebr. c. 12.

(33) See *ante*, the note to p. 208.

Stiles hath two sons, John and Francis, Francis may claim as heir to John without naming their father Geoffrey; and so the son of Francis may claim as cousin and heir to Matthew the son of John, without naming the grandfather; *viz.* as son of Francis, who was the brother of John, who was the father of Matthew. But though the common ancestors are not named in deducing the pedigree, yet the law still respects them as the fountains of inheritable blood; and therefore, in order to ascertain the collateral heir of John Stiles, it is first necessary to recur to his ancestors in the first degree; and, if they have left any other issue besides John, that issue will be his heir. On default of such, we must ascend one step higher, to the ancestors in the second degree, and then to those in the third, and fourth, and so upwards, *in infinitum*; till some couple of ancestors be found, who have other issue descending from them besides the deceased, in a parallel or collateral line. From these ancestors the heir of John Stiles must derive his descent; and in such derivation the same rules must be observed, with regard to sex, *primogeniture, and representation, that have before been laid down with regard to lineal descents from the person of the last proprietor.

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The heir must be the nearest kinsman of the whole blood—

But, secondly, the heir need not be the nearest kinsman absolutely, but only *sub modo*; that is, he must be the nearest kinsman of the *whole* blood; for if there be a much nearer kinsman of the *half* blood, a distant kinsman of the whole blood shall be admitted, and the other entirely excluded; nay, the estate shall escheat to the lord, sooner than the half blood shall inherit.

that is, one descended from the same couple of ancestors:

A kinsman of the whole blood is he that is derived, not only from the same ancestor, but from the same couple of ancestors. For, as every man's own blood is compounded of the bloods of his respective ancestors, he only is properly of the whole or entire blood with another, who hath, so far as the distance of degrees will permit, all the same ingredients in the composition of his blood that the other hath. Thus, the blood of John Stiles being composed of those of Geoffrey Stiles his father, and Lucy Baker his mother, therefore his brother Francis, being descended from both the same parents, hath entirely the same blood with John Stiles; or he is his brother of the whole blood. But if, after the death of Geoffrey, Lucy Baker the mother marries

but kinsmen of the half blood cannot inherit to each other.

a second husband, Lewis Gay, and hath issue by him; the blood of this issue, being compounded of the blood of Lucy Baker, (it is true,) on the one part, but that of Lewis Gay, (instead of Geoffrey Stiles,) on the other part, it hath therefore only half the same ingredients with that of John Stiles; so that he is only his brother of the half blood, and for that reason they shall never inherit to each other. So also, if the father has two sons, A. and B., by different venters or wives; now these two brethren are not brethren of the whole blood, and therefore shall never inherit to each other, but the estate shall rather escheat to the lord. Nay, even if the father dies, and his lands descend to his eldest son A., who enters thereon, and dies seised (34) without issue; still B. shall not be heir to this estate, because he is only of the half blood to A., the person last seised: but it shall descend to a sister (if any) of the whole blood to A.: for, in such cases, the maxim is, that the seisin or *possessio fratris facit sororem esse hæredem*. Yet, had A. died without entry, then B. might have inherited; not as *heir to A. his half [*228] brother, but as heir to their common father, who was the person last actually seised (y) (35) (36).

This total exclusion of the half blood from the inheritance, being almost peculiar to our own law, is looked upon as a strange hardship by such as are unacquainted with the reasons on which it is grounded. But these censures arise from a misapprehension of the rule, which is not so much to be considered in the light of a rule of descent, as of a rule

Reasons of this exclusion of the half blood.

(y) 2 Hale, H. C. L. 120.

(34) It has been held a standing rule of law, that *non jus, sed seisin, facit stipitem*: in other words, that no one can be heir to any land of his ancestor's, of which land the ancestor was not actually seised: (see, however, *ante*, the notes to pp. 128, 209 :) and that no incorporeal hereditaments can be derived from any ancestor, who had not obtained therein what as to such subjects is deemed equivalent to corporal seisin. (See *ante*, p. 209, with the notes thereto.)

(35) And the descent (in the case put in the text,) even under the old

law, would have been considered as immediate from the father to B. the youngest son. (*Reeve v. Malster*, W. Jones, 362.)

(36) Mr. Christian observes, that "of reversions, remainders, and executory devises, there can be no seisin or *possessio fratris*." [This is very clear: of an estate which is not an estate in possession, there cannot possibly be a *possessio fratris*. (See *ante*, pp. 165, 175, and the note to the page last cited: as also the note to p. 209.)—Ed.]

of evidence (37); an auxiliary rule, to carry a former into execution. And here we must again remember, that the great and most universal principle of collateral inheritances being this, that the heir to a *feudum antiquum* must be of the blood of the first feudatory or purchasor, that is, derived in a lineal descent from him; it was originally requisite, as upon gifts in tail it still is, to make out the pedigree of the heir from the first donee or purchasor, and to shew that such heir was his lineal representative. But when, by length of time and a long course of descents, it came (in those rude and unlettered ages) to be forgotten who was really the first feudatory or purchasor, and thereby the proof of an actual descent from him became impossible; then the law substituted what Sir Martin Wright (z) calls a *reasonable*, in the stead of an *impossible*, proof: for it remits the proof of an actual descent from the first purchasor; and only requires in lieu of it, that the claimant be next of the whole blood to the person last in possession, (or derived from the same couple of ancestors,) which will probably answer the same end as if he could trace his pedigree in a direct line from the first purchasor. For he who is my kinsman in the whole blood can have no ancestors beyond or higher than the common stock, but what are equally my ancestors also; and mine are *vice versâ* his: he therefore is very likely to be derived from that unknown ancestor of mine, from whom the inheritance descended. But a kinsman of the half blood has but one half of his ancestors above the common stock the same as mine; and therefore there is not the same probability (38) of that standing re-

(z) Tenures, 186.

(37) See *ante*, the note to p. 224.

(38) This reason will be found on examination to be unsatisfactory, and indeed not to be founded in truth. It is not true, that in all, or even in most cases, there is a greater probability that a kinsman of the whole blood is derived from the blood of the first purchasor, than a kinsman of the half blood; or that a kinsman of the half blood has in all, or even in most cases, fewer common ancestors of the person

last seised, than a kinsman of the whole blood. My brother of the half blood, (the issue of my father,) has one ancestor, (my father,) more in common with me, than my uncle of the whole blood; several more than my great-uncle, (see *post*, page 231,) and more, almost innumerable more, than the descendants of my paternal grandmother's maternal grandfather. Yet all these may inherit an estate descended to me from my father, and

quisite in the law, that he be derived from the blood of the first purchasor.

*To illustrate this by example. Let there be John Stiles, and Francis, brothers, by the same father and mother, and another son of the same mother by Lewis Gay, a second husband. Now, if John dies seised of lands, but it is uncertain whether they descended to him from his father or mother; in this case his brother Francis, of the whole blood, is qualified to be his heir; for he is sure to be in the line of descent from the first purchasor, whether it were the line of the father or the mother. But, if Francis should die before John, without issue, the mother's son by Lewis Gay (or brother of the half blood) is utterly incapable of being heir; for he cannot prove his descent from the first purchasor, who is unknown, nor has he that fair probability which the law admits as presumptive evidence, since he is to the full as likely *not to be* descended from the line of the first purchasor, as *to be* descended; and therefore the inheritance shall go to the nearest relation possessed of this presumptive proof, the whole blood.

And, as this is the case *in feudis antiquis*, where there really did once exist a purchasing ancestor, who is forgotten; it is also the case *in feudis novis* held *ut antiquis*, where the purchasing ancestor is merely ideal, and never existed but only in fiction of law. Of this nature are all grants of lands in fee-simple at this day, which are inheritable as if they descended from some uncertain indefinite ancestor, and therefore any of the collateral kindred of the real modern purchasor (and not his own offspring only) may inherit them, provided they be of the whole blood; for all such are, in judgment of law, likely enough to be derived from this indefinite ancestor: but those of the half blood are excluded, for want of the same probability. Nor should this be

Example.

[* 229]

The like doctrine obtains *in feudis novis*, held *ut antiquis*, as *in feudis antiquis*.

purchased by him, though my half brother, the son of my father, the original purchaser, cannot inherit. And it is plain, the law does not consider the point as hinging upon greater or less probability: for then it would only *postpone* the half blood, instead of utterly *excluding* it, so that land shall rather escheat than devolve upon a

kinsman of the half blood. (See *ante*, p. 224, note (22).)

This note is partly extracted from the MS. already mentioned in note (6) to p. 80, as supposed to be penned by a noble and learned Judge still living. [Since this note was first published, the Judge alluded to, Lord Redesdale, is deceased.]

[* 230]

thought hard, that a brother of the purchasor, though only of the half blood, must thus be disinherited, and a more remote relation of the whole blood admitted, merely upon a supposition and fiction of law: since it is only upon a like supposition and fiction, that brethren of purchasors (whether of the whole or half blood) are entitled to inherit at all; for we have seen that, *in feudis stricte novis*, neither brethren nor any other collaterals were admitted. As *therefore *in feudis antiquis* we have seen the reasonableness of excluding the half blood, if by a fiction of law a *feudum novum* be made descendible to collaterals as if it was *feudum antiquum*, it is just and equitable that it should be subject to the same restrictions as well as the same latitude of descent.

The doctrine of whole blood calculated to supply the frequent impossibility of proving a descent from the first purchasor.

Perhaps by this time the exclusion of the half blood does not appear altogether so unreasonable as at first sight it is apt to do. It is certainly a very fine-spun and subtle nicety: but considering the principles upon which our law is founded, it is not an injustice, nor always a hardship; since even the succession of the whole blood was originally a beneficial indulgence, rather than the strict right of collaterals; and though that indulgence is not extended to the demi-kindred, yet they are rarely abridged of any right which they could possibly have enjoyed before. The doctrine of the whole blood was calculated to supply the frequent impossibility of proving a descent from the first purchasor, without some proof of which (according to our fundamental maxim) there can be no inheritance allowed of. And this purpose it answers, for the most part, effectually enough. I speak with these restrictions, because it does not, neither can any other method answer this purpose entirely. For though all the ancestors of John Stiles, above the common stock, are also the ancestors of his collateral kinsman of the whole blood; yet, unless that common stock be in the first degree, (that is, unless they have the same father and mother,) there will be intermediate ancestors, below the common stock, that belong to either of them respectively, from which the other is not descended, and therefore can have none of their blood. Thus, though John Stiles and his brother of the whole blood can each have no other ancestors than what are in common to them both; yet with regard to his uncle, where the common stock is removed one degree higher, (that is, the grandfather and grandmother,) one half of John's an-

cestors will not be the ancestors of his uncle: his *patruus*, or father's brother, derives not his descent from John's maternal ancestors: nor his *avunculus*, or mother's brother, *from those in the paternal line. Here then the supply of proof is deficient, and by no means amounts to a certainty: and the higher the common stock is removed, the more will even the probability decrease. But it must be observed, that (upon the same principles of calculation) the half blood have always a much less chance to be descended from an unknown indefinite ancestor of the deceased, than the whole blood in the same degree. As, in the first degree, the whole brother of John Stiles is sure to be descended from that unknown ancestor; his half brother has only an even chance, for half John's ancestors are not his. So, in the second degree, John's uncle of the whole blood has an even chance; but the chances are three to one against his uncle of the half blood, for three fourths of John's ancestors are not his. In like manner, in the third degree, the chances are only three to one against John's great uncle of the whole blood, but they are seven to one against his great uncle of the half blood, for seven eighths of John's ancestors have no connection in blood with him. Therefore, the much less probability (39) of the half blood's descent from the first purchaser, compared with that of the whole blood, in the several degrees, has occasioned a general exclusion of the half blood in all. [* 231]

But, while I thus illustrate the reason of excluding the half blood in general, I must be impartial enough to own, that, in some instances, the practice is carried farther than the principle upon which it goes will warrant. Particularly when a kinsman of the whole blood in a remoter degree, as the uncle or great uncle, is preferred to one of the half blood in a nearer degree, as the brother; for the half brother hath the same chance of being descended from the purchasing ancestor as the uncle; and a thrice (40) better chance than the great uncle or kinsman in the third degree. It is also more especially overstrained, when a man has two sons

Hardship of excluding the half brother by the father's side.

(39) But see the last note.

(40) Mr. Christian says, "this ought to be twice; for the half brother has one chance in two, the great uncle

one in four; the chance of the half brother is therefore twice better than that of the great uncle."

by different venters, and the estate on his death descends from him to the eldest, who enters and dies without issue; in which case the younger son cannot inherit this estate, because he is not of the whole blood to the last proprietor (a).

[* 232] This, it must be *owned, carries a hardship with it, even upon feodal principles: for the rule was introduced only to supply the proof of a descent from the first purchasor; but here, as this estate notoriously descended from the father, and as both the brothers confessedly sprung from him, it is demonstrable that the half brother must be of the blood of the first purchasor, who was either the father or some of the father's ancestors. When, therefore, there is actual demonstration of the thing to be proved, it is hard to exclude a man by a rule substituted to supply that proof when deficient. So far as the inheritance can be evidently traced back, there seems no need of calling in this presumptive proof, this rule of probability, to investigate what is already certain. Had the elder brother, indeed, been a purchasor, there would have been no hardship at all, for the reasons already given: or had the *frater uterinus* only, or brother by the mother's side, been excluded from an inheritance which descended from the father, it had been highly reasonable.

In the descent of the crown, and in estates-tail, half blood is no impediment.

Indeed, it is this very instance of excluding a *frater consanguineus*, or brother by the father's side, from an inheritance which descended *a patre*, that Craig (b) has singled out on which to ground his strictures on the English law of half blood. And, really, it should seem as if originally the custom of excluding the half blood in Normandy (c) extended only to exclude a *frater uterinus*, when the inheritance descended *a patre*, and *vice versâ*, and possibly in England also; as even with us it remained a doubt, in the time of

(a) A still harder case than this happened, M. 10 Edw. III. On the death of a man, who had three daughters by a first wife, and a fourth by another, his lands descended equally to all four as coparceners. Afterwards, the two eldest died without issue; and it was held that the third daughter alone should inherit their shares, as being their heir of the whole blood; and that the youngest daughter should re-

tain only her original fourth part of their common father's lands. (10 Ass. 27.) And yet it was clear law in M. 19 Edw. II. that where lands had descended to two sisters of the half blood, as coparceners, each might be heir of those lands to the other. (Mayn. Edw. II. 628; Fitz. Abr. tit. *Quare impedit*, 177.)

(b) L. 2, t. 15, s. 14.

(c) Gr. Coustum, c. 25.

Bracton (*d*), and of Fleta (*e*), whether the half blood on the father's side was excluded from the inheritance which originally descended from the common father, or only from such as descended from the respective mothers, and from newly-purchased lands. So also the rule of law, as laid *down by our Fortescue (*f*), extends no farther than this: [* 233] *frater fratri uterino non succedet in hæreditate paterna*. It is, moreover, worthy of observation, that by our law, as it now stands, the crown (which is the highest inheritance in the nation) may descend to the half blood of the preceding sovereign (*g*), so that it be the blood of the first monarch purchasor, or (in the feudal language) conqueror of the reigning family. Thus it actually did descend from king Edward the sixth to queen Mary, and from her to queen Elizabeth, who were respectively of the half blood to each other. For, the royal pedigree being always a matter of sufficient notoriety, there is no occasion to call in the aid of this presumptive rule of evidence, to render probable the descent from the royal stock, which was formerly king William the Norman, and is now (by act of Parliament (*h*)) the princess Sophia of Hanover. Hence also it is that in estates-tail, where the pedigree from the first donee must be strictly proved, half blood is no impediment to the descent (*i*): because, when the lineage is clearly made out, there is no need of this auxiliary proof (41). How far it might be desirable for the legislature to give relief, by amending the law of descents in one or two instances, and ordaining that the half blood might always inherit, where the estate notoriously descended from its own proper ancestor, and in cases of new purchased lands, or uncertain descents, should never be excluded by the whole blood in a remoter degree; or how far a private inconvenience should be still submitted to, rather than a long established rule should be shaken, it is not for me to determine (42).

(*d*) L. 2, c. 30, s. 3.

(*e*) L. 6, c. 1, s. 14.

(*f*) De laud. LL. Angl. 5.

(*g*) Plowd. 245; Co. Litt. 15.

(*h*) 12 Will. III. c. 2.

(*i*) Litt. s. 14, 15.

(41) Mr. Christian observes, "and also in titles of honour, half blood is no impediment to the descent: but a title can only be transmitted to those

who are descended from the first person ennobled. Co. Litt. 15."

(42) The MS. noticed *ante*, in the note to p. 228, supplies the following

The estate must descend to the issue of the nearest couple of ancestors that have left descendants.

The rule then, together with its illustration, amounts to this: that in order to keep the estate of John Stiles as nearly as possible in the line of his purchasing ancestor, it must descend to the issue of the nearest couple of ancestors that have left descendants behind them; because the descendants of one ancestor only are not so likely to be in the line of that purchasing ancestor, as those who are descended from both.

Difficulty arising from this rule.

[* 234]

*But here another difficulty arises. In the second, third, fourth, and every superior degree, every man has many couples of ancestors, increasing according to the distances in a geometrical progression upwards (*k*), the descendants of all which respective couples are (representatively) related to him in the same degree. Thus, in the second degree, the issue of George and Cecilia Stiles and of Andrew and Esther Baker, the two grandsires and grandmothers of John Stiles, are each in the same degree of propinquity; in the third degree, the respective issues of Walter and Christian Stiles, of Luke and Frances Kempe, of Herbert and Hannah Baker, and of James and Emma Thorpe, are (upon the extinction of the two inferior degrees) all equally entitled to call themselves the next kindred of the whole blood to John Stiles. To which, therefore, of these ancestors must we first resort, in order to find out descendants to be preferably called to the inheritance? In answer to this, and

(*k*) See pag. 204.

observations upon the passage in the text:—

“It is in general dangerous to alter settled rules of law, especially when the alteration may be productive of considerable consequences beyond the immediate object of the legislature. But, in this case, the alteration necessary seems plain and simple; merely wiping out of our law books the idea of half blood, and then the course of descent will flow in its natural channel without any interruption. The inconvenience arising from the exclusion of the half blood is generally guarded against by settlements and wills; but it may rise to something more than

private inconvenience; it may become of public consequence, when the descent of a peerage upon a brother of the half blood is unaccompanied by the estate, which ought to support the peer, and render him that independent member of the legislature, which it is so much the interest of the public he should be: a remote kinsman, or perhaps the crown, obtaining the patrimony of the family, and leaving the heir in a poverty injurious to his country.” [Common sense has at length prevailed over technical fiction, as to this matter; see the statute cited *ante*, in the note to p. 200.]

likewise to avoid all other confusion and uncertainty that might arise between the several stocks wherein the purchasing ancestor may be sought for, another qualification is requisite, besides the *proximity* and *entirety*, which is that of *dignity* or *worthiness*, of blood. For,

VII. The seventh and last rule or canon is, that in collateral inheritances the male stocks shall be preferred to the female, (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near,)—unless where the lands have, in fact, descended from a female (43).

VII. In collateral inheritances the male stocks shall be preferred to the female; unless the lands descended from a female.

Thus the relations on the father's side are admitted *in infinitum*, before those on the mother's side are admitted at all (*l*); and the relations of the father's father, before those of the father's mother; and so on. And in this the English law is not singular, but warranted by the examples of the Hebrew and Athenian laws, as stated by Selden (*m*), and Petit (*n*); though among the Greeks in the time of Hesiod (*o*), when a man died without wife or children, all his kindred (without any *distinction) divided his estate among them. It is likewise warranted by the example of the Roman laws; wherein the *agnati*, or relations by the father, were preferred to the *cognati* or relations by the mother, till the edict of the emperor Justinian (*p*) abolished all distinction between them. It is also conformable to the customary law of Normandy (*q*), which indeed in most respects agrees with our English law of inheritance.

The relations on the father's side admitted *in infinitum*, before those on the mother's side are admitted at all; and so on.

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However, I am inclined to think, that this rule of our law does not owe its immediate original to any view of conformity to those which I have just now mentioned; but was established in order to effectuate and carry into execution the fifth rule, or principal canon of collateral inheritance, before laid down; that every heir must be of the blood of the first purchasor. For, when such first purchasor was not easily to be discovered after a long course of descents, the lawyers not only endeavoured to investigate him by taking

Origin and intent of this rule.

(*l*) Litt. s. 4.

(*m*) De succ. Ebræor. c. 12.

(*n*) LL. Attic. l. 1, t. 6.

(*o*) Θεογον. 606.

(*p*) Nov. 118.

(*q*) Gr. Coustum, c. 25.

(43) See the 7th and 8th sections of the statute of 3 & 4 Gul. IV. c. 106.

the next relation of the whole blood to the person last in possession, but also, considering that a preference had been given to males (by virtue of the second canon) through the whole course of lineal descent from the first purchasor to the present time, they judged it more likely that the lands should have descended to the last tenant from his male than from his female ancestors; from the father (for instance) rather than from the mother; from the father's father, rather than from the father's mother; and therefore they hunted back the inheritance (if I may be allowed the expression) through the male line; and gave it to the next relations on the side of the father, the father's father, and so upwards; imagining with reason that this was the most probable way of continuing it in the line of the first purchasor. A conduct much more rational than the preference of the *agnati*, by the Roman laws: which as they gave no advantage to the males in the first instance or direct lineal succession, had no reason for preferring them in the transverse collateral one: upon which account this preference was very wisely abolished by Justinian.

[* 236]

Where lands descend from the mother's side, no relation by the father's side, as such, can ever be admitted.

*That this was the true foundation of the preference of the *agnati* or male stocks, in our law, will farther appear, if we consider, that, whenever the lands have notoriously descended to a man from his mother's side, this rule is totally reversed; and no relation of his by the father's side, as such, can ever be admitted to them; because he cannot possibly be of the blood of the first purchasor. And so, *e converso*, if the lands descended from the father's side, no relation of the mother, as such, shall ever inherit. So also, if they in fact descended to John Stiles from his father's mother Cecilia Kempe; here not only the blood of Lucy Baker his mother, but also of George Stiles his father's father, is perpetually excluded. And, in like manner, if they be known to have descended from Frances Holland the mother of Cecilia Kempe, the line not only of Lucy Baker, and of George Stiles, but also of Luke Kempe the father of Cecilia, is excluded. Whereas, when the side from which they descended is forgotten, or never known, (as in the case of an estate newly purchased to be holden *ut feudum antiquum*,) here the right of inheritance first runs up all the father's side, with a preference to the male stocks in every instance; and, if it finds no heirs there, it then, and then only, resorts

to the mother's side; leaving no place untried, in order to find heirs that may by possibility be derived from the original purchasor. The greatest probability of finding such was among those descended from the male ancestors; but upon failure of issue there, they may possibly be found among those derived from the females.

This I take to be the true reason of the constant preference of the agnatic succession, or issue derived from the male ancestors, through all the stages of collateral inheritance; as the ability for personal service was the reason for preferring the males at first in the direct lineal succession. We see clearly, that if males had been perpetually admitted, in utter exclusion of females, the tracing the inheritance back through the male line of ancestors must at last have inevitably brought us up to the first purchasor: but as males have not been **perpetually admitted*, but only *generally preferred*; as females have not been *utterly excluded*, but only *generally postponed* to males; the tracing the inheritance up through the male stocks will not give us absolute demonstration, but only a strong probability, of arriving at the first purchasor; which, joined with the other probability, of the wholeness or entirety of the blood, will fall little short of a certainty.

The greatest probability of finding heirs being among the descendants of the male ancestor, was the true reason of their preference in collateral inheritances.

[* 237]

Before we conclude this branch of our inquiries, it may not be amiss to exemplify these rules by a short sketch of the manner in which we must search for the heir of a person, as *John Stiles*, who dies seised of land which he acquired, and which therefore he held as a feud of indefinite antiquity (*r*).

Exemplification of these rules.

In the first place succeeds the eldest son, Matthew Stiles, or his issue: (No. 1.)—if this line be extinct, then Gilbert Stiles and the other sons, respectively, in order of birth, or their issue: (No. 2.)—in default of these all the daughters together, Margaret and Charlotte Stiles, or their issue: (No. 3.)—On failure of the descendants of *John Stiles* himself, the issue of Geoffrey and Lucy Stiles, his parents, is called in: *viz.* first, Francis Stiles, the eldest brother of the whole blood, or his issue: (No. 4.)—then Oliver Stiles, and the other whole brothers, respectively, in order of birth, or their issue: (No. 5.)—then the sisters of the whole blood all

(*r*) See the table of descents annexed.

together, Bridget and Alice Stiles, or their issue: (No. 6.)—In defect of these, the issue of George and Cecilia Stiles, his father's parents; respect being still had to their age and sex: (No. 7.)—then the issue of Walter and Christian Stiles, the parents of his paternal grandfather: (No. 8.)—then the issue of Richard and Anne Stiles, the parents of his paternal grandfather's father: (No. 9.)—and so on in the paternal grandfather's paternal line, or blood of Walter Stiles, *in infinitum*. In defect of these, the issue of William and Jane Smith, the parents of his paternal grandfather's mother: (No. 10.)—and so on in the paternal grandfather's maternal line, or blood of Christian Smith, *in infinitum*: till both the *immediate bloods of George Stiles, the paternal grandfather, are spent.—Then we must resort to the issue of Luke and Frances Kempe, the parents of *John Stiles's* paternal grandmother: (No. 11.)—then to the issue of Thomas and Sarah Kempe, the parents of his paternal grandmother's father: (No. 12.)—and so on in the paternal grandmother's paternal line, or blood of Luke Kempe, *in infinitum*.—In default of which we must call in the issue of Charles and Mary Holland, the parents of his paternal grandmother's mother: (No. 13.)—and so on in the paternal grandmother's maternal line, or blood of Frances Holland, *in infinitum*; till both the immediate bloods of Cecilia Kempe, the paternal grandmother, are also spent.—Whereby the paternal blood of *John Stiles* entirely failing, recourse must then, and not before, be had to his maternal relations; or the blood of the Bakers, (Nos. 14, 15, 16.) Willis's, (No. 17.) Thorpe's, (Nos. 18, 19.) and White's, (No. 20.) in the same regular successive order as in the paternal line.

The case of
Clere and
Brooke, consi-
dered.

The student should however be informed, that the class, No. 10, would be postponed to No. 11, in consequence of the doctrine laid down, *arguendo*, by justice Manwoode, in the case of *Clere* and *Brooke* (*s*); from whence it is adopted by Lord Bacon (*t*), and Sir Matthew Hale (*u*): because, it is said, that all the female ancestors on the part of the father are equally worthy of blood; and in that case proximity shall prevail. And yet, notwithstanding these respectable authorities, the compiler of this table hath ventured (in point of

(*s*) Plowd. 450.

(*t*) Elem. c. 1.

(*u*) H. C. L. 240, 244.

theory, for the case never yet occurred in practice, (to give the preference to No. 10 before No. 11; for the following reasons: 1. Because this point was not the principal question in the case of *Clere* and *Brooke*: but the law concerning it is delivered *obiter* only, and in the course of argument, by justice Manwoode (44); though afterwards said to be confirmed by the three other justices in separate, extrajudicial, conferences with the reporter. 2. Because the chief justice, Sir James Dyer, in reporting the resolution of the court in what seems to be the same case (*w*), takes no notice of this doctrine. 3. Because it appears from Plowden's report that very many gentlemen of the law were dissatisfied *with this position of justice Manwoode; since the blood of No. 10 was derived to the purchasor through a greater number of males than the blood of No. 11, and was therefore, in their opinion, the more worthy of the two. [* 239]

(*w*) Dyer, 314.

(44) The disputed doctrine was thus laid down by Mr. Justice Manwoode in the case of *Clere v. Brook*, (Plowd. 450)—“The brother or sister of the purchaser's grandmother, *viz.* the mother of the purchaser's father, shall be preferred before the brother or sister of the purchaser's great grandmother, *viz.* the mother of the purchaser's father's father; because they are equally worthy in blood, (for, such heirs come from the blood of the female sex, from which the purchaser's father issued,) and where they are all equally worthy, the *next* of blood shall always be preferred as heir.”

Mr. Watkins devotes the 3rd section of the 3rd chapter of his *Essay on the Law of Descents*, to a refutation of this doctrine, and a support of that maintained by our author. On the other hand the question is ably discussed by Mr. Osgoode in his “Remarks on the Law of Descents,” (from which copious extracts are given in 3 Cruise's Digest, 384—411, and also in a long note to 2 Hale's Hist. of the Com. Law, p. 128, 5th edition,) where our author's

reasoning is temperately examined and controverted.

The result appears to be, that, if the proximity which is the object of the law be an absolute proximity, the doctrine of Justice Manwoode ought to prevail; but that there may be some grounds for qualifying the rule of proximity, and receiving it only *sub modo*, if that should ever be necessary to make it accordant with the following two admitted rules: 1st, that, in the case of a purchase, the paternal line shall always be preferred to the maternal, and the heirs on the part of the mother shall never succeed till those on the part of the father be exhausted; 2nd, that the father has two immediate bloods in him, *viz.* the blood of his father, and the blood of his mother.

Since the first publication of this note, the point mooted has been legislatively set at rest, by the 7th and 8th sections of the statute of 3 & 4 Gul. IV. c. 106, and the law is established in conformity with Blackstone's doctrine.

4. Because the position itself destroys the otherwise entire and regular symmetry of our legal course of descents, as is manifest by inspecting the table; wherein No. 16, which is analagous in the maternal line to No. 10 in the paternal, is preferred to No. 18, which is analogous to No. 11, upon the authority of the eighth rule laid down by Hale himself: and it destroys also that constant preference of the male stocks in the law of inheritance, for which an additional reason is before (*x*) given, besides the mere dignity of blood.

5. Because it introduces all that uncertainty and contradiction, which is pointed out by an ingenious author (*y*); and establishes a collateral doctrine (*viz.* the preference of No. 11 to No. 10.) seemingly, though perhaps not strictly, incompatible with the principal point resolved in the case of Clere and Brooke, *viz.* the preference of No. 11 to No. 14. And, though that learned writer proposes to rescind the principal point then resolved, in order to clear this difficulty; it is apprehended, that the difficulty may be better cleared, by rejecting the collateral doctrine, which was never yet resolved at all.

6. Because the reason that is given for this doctrine by Lord Bacon, (*viz.* that in any degree, paramount the first, the law respecteth proximity, and not dignity of blood,) is directly contrary to many instances given by Plowden and Hale, and every other writer on the law of descents.

7. Because this position seems to contradict the allowed doctrine of Sir Edward Coke (*z*); who lays it down (under different names) that the blood of the Kempes (*alias* Sandies) shall not inherit till the blood of the Stiles's (*alias* Fairfields) fail. Now the blood of the Stiles's does certainly not fail, till both No. 9 and No. 10 are extinct. Wherefore No. 11 (being the blood of the Kempes) ought not to inherit till then.

8. Because in the case, Mich. 12 Edw. IV. 14 (*a*), (much relied on in that of Clere and Brooke) it is laid down as a rule, that "*cestuy que doit inheriter al pere, doit inheriter al fits*" (*b*). And so Sir Matthew Hale (*c*) says, "that though the law excludes the father from inheriting, yet it substitutes and directs the descent, as it should have been, had the father inherited."

(*x*) Pag. 235—237.

(*y*) Law of Inheritances, 2d edit., pag. 30, 38, 61, 62, 66.

(*z*) Co. Litt. 12; Hawk. Abr. in loc.

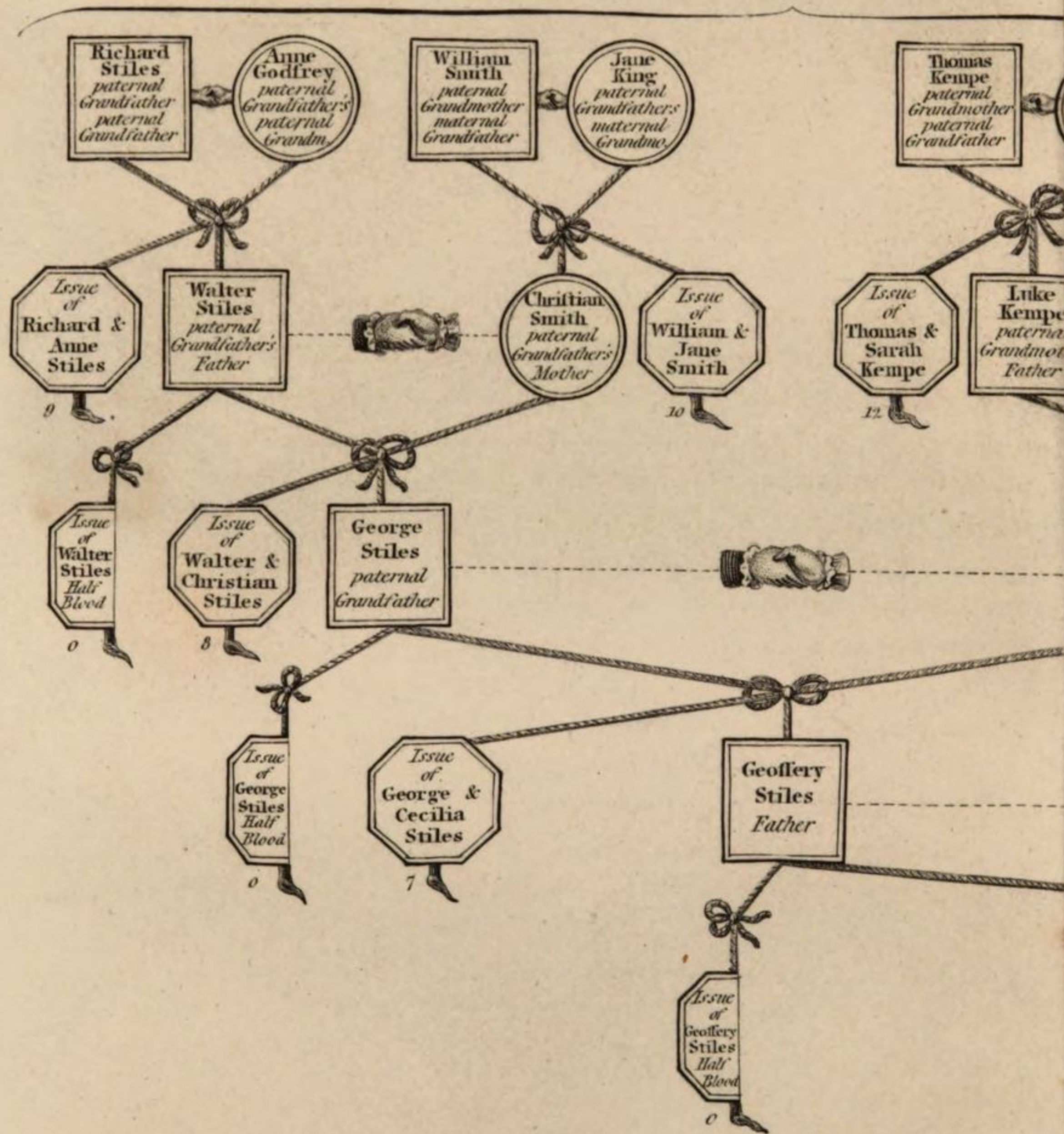
(*a*) Fitz. Abr. tit. Discent, 2; Bro.

Abr. tit. Discent, 3.

(*b*) See pag. 223.

(*c*) Hist. C. L. 243.

Paternal Line.



When inspecting this table, the reader will bear in mind the rational changes in the law of inheritance which have been effected by the statute cited, ante, in the note to p. 200 without reference to which this tabular view would only mislead.

Now it is settled, by the resolution in Clere *and Brooke, that No. 10 should have inherited before No. 11 to Geoffrey Stiles, the father, had he been the person last seised; and therefore No. 10 ought also to be preferred in inheriting to *John Stiles*, the son.

In case *John Stiles* was not himself the purchasor, but the estate in fact came to him by descent from his father, mother, or any higher ancestor, there is this difference; that the blood of that line of ancestors, from which it did not descend, can never inherit: as was formerly fully explained (*d*). And the like rule, as is there exemplified, will hold upon descents from any other ancestors.

If the person last seised took by inheritance, the blood of that line of ancestors from which the land did not descend can never inherit.

The student should also bear in mind, that, during this whole process, *John Stiles* is the person supposed to have been last actually seised of the estate. For if ever it comes to vest in any other person, as heir to *John Stiles*, a new order of succession must be observed upon the death of such heir; since he, by his own seisin, now becomes himself an ancestor or *stipes*, and must be put in the place of *John Stiles*. The figures therefore denote the order in which the several classes would succeed to *John Stiles*, and not to each other: and before we search for an heir in any of the higher figures, (as No. 8) we must be first assured that all the lower classes (from No. 1 to No. 7) were extinct, at *John Stiles's* decease.

Explanation of the table.

(*d*) See pag. 236.

CHAPTER XV.

OF TITLE BY PURCHASE, AND FIRST
BY ESCHEAT.

Definition of
purchase.

PURCHASE, *perquisitio*, taken in its largest and most extensive sense, is thus defined by Littleton (*a*): the possession of lands and tenements, which a man hath by his own act or agreement, and not by descent from any of his ancestors or kindred. In this sense it is contradistinguished from acquisition by right of blood, and includes every other method of coming to an estate, but merely that by inheritance (*1*): wherein the title is vested in a person, not by his own act or agreement, but by the single operation of law (*b*).

What is considered a taking
by purchase,
and what by descent.

Purchase, indeed, in its vulgar and confined acceptation, is applied only to such acquisitions of land, as are obtained by way of bargain and sale, for money, or some other valuable consideration. But this falls far short of the legal idea of purchase: for, if I *give* land freely to another, he is in the eye of the law a purchasor (*c*); and falls within Littleton's definition, for he comes to the estate by his own agreement, that is, he consents to the gift. A man who has his father's estate settled upon him in tail, before he was

(*a*) S. 12.

(*b*) Co. Litt. 18.

(*c*) Ibid.

(1) The first section of the statute of 3 & 4 Gul. IV. c. 106, enacts that the word "purchaser" shall, throughout that act, except the context in any passage therein excludes such construction, be interpreted to mean the person who last acquired land

otherwise than by descent, or than by any escheat, partition, or inclosure, by the effect of which the land shall have become part of, or descendible in the same manner as other land *acquired by descent*.

born, is also a purchasor ; for he takes quite another estate than the law of descents would have given him. Nay, even if the ancestor devises his estate to his heir at law by will, with other limitations, or in any other shape than the course of descents would direct, such heir shall take by purchase (*d*). But if a man, seised in fee, devises his whole estate to his heir at law, so that the heir takes neither a greater nor a less estate by the *devise than he would have done without it, he shall be adjudged to take by descent (*e*) (2), even though it be charged with incumbrances (*f*); this being for the benefit of creditors, and others, who have demands on the estate of the ancestor (3). If a remainder be limited to the heirs of Sempronius, here Sempronius himself takes nothing; but if he dies during the continuance of the particular estate, his heirs shall take as purchasors (*g*). But if an estate be made to A. for life, remainder to his right heirs in fee, his heirs shall take by descent: for it is an ancient rule of law, that wherever the ancestor takes an estate for life, the heir cannot by the same conveyance take an estate in fee by *purchase*, but only by *descent* (*h*) (4). And, if A. dies before entry, still his heir shall take by descent, and not by purchase; for, where the heir takes any thing that might have vested in the ancestor, he takes by way of descent (*i*). The ancestor, during his life, beareth in himself all his heirs (*k*); and

(*d*) Lord Raym. 728.

(*e*) 1 Roll. Abr. 626.

(*f*) Salk. 241; Lord Raym. 728.

(*g*) 1 Roll. Abr. 627.

(*h*) 1 Rep. 104; 2 Lev. 60; Raym. 334.

(*i*) 1 Rep. 98.

(*k*) Co. Litt. 22.

(2) The doctrine laid down in the text, that when a devise of lands to the heir at law makes no alteration in the nature or limitation of the estate, the heir will take, not by purchase under the will, but by his preferable title by descent, is no longer law. The statute of 3 & 4 Gul. IV. c. 106, enacts, that an heir to whom land is devised by his ancestor shall take as devisee, and not by descent; and that a limitation of land, by any assurance, to the grantor and his heirs, shall create an estate by purchase.

(3) By the statute of 3 & 4 Gul. IV.

c. 104, freehold and copyhold estates are made assets, to be administered in courts of equity, for payment of the debts of the person who died seised of or entitled to such estates, if he has not by his will legally charged them with, or devised them subject to, payment of his just debts. Provided that, in the administration of assets by courts of equity, under this act, creditors by specialty, in which the heirs are bound, shall be entitled to priority of payment.

(4) See *ante*, the note to p. 171.

therefore, when once he is or might have been seised of the lands, the inheritance so limited to his heirs vests in the ancestor himself: and the word "heirs" in this case is not esteemed a word of *purchase*, but a word of *limitation* (5), enuring so as to increase the estate of the ancestor from a tenancy for life to a fee-simple. And, had it been otherwise, had the heir (who is uncertain till the death of the ancestor) been allowed to take as a purchasor originally nominated in the deed, as must have been the case if the remainder had been expressly limited to Matthew or Thomas by name; then, in the times of strict feudal tenure, the lord would have been defrauded by such a limitation of the fruits of his signiory, arising from a descent to the heir.

Purchase called
by the feudists
conquest.

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What we call *purchase*, *perquisitio*, the feudists called *conquest*, *conquæstus*, or *conquisitio* (l): both denoting any means of acquiring an estate out of the common course of inheritance. And this is still the proper phrase in the law of Scotland (m): as it was among the Norman jurists, who styled *the first purchasor (that is, he who brought the estate into the family which at present owns it) the conqueror or *conquereur* (n). Which seems to be all that was meant by the appellation which was given to William the Norman, when his manner of ascending the throne of England was, in his own and his successors' charters, and by the historians of the times, entitled *conquæstus*, and himself *conquæstor* or *conquisitor* (o); signifying that he was the first of his family who acquired the crown of England, and from whom therefore all future claims by descent must be derived; though now, from our disuse of the feudal sense of the word, together with the reflection on his forcible method of acquisition, we are apt to annex the idea of *victory* to this name of *conquest* or *conquisition*: a title which, however just with regard to the *crown*, the conqueror never pretended with regard to the *realm* of England; nor, in fact, ever had (p) (6).

(l) Crag. l. 1, t. 10, s. 18.

(m) Dalrymple of Feuds, 210.

(n) Gr. Coustum. Gloss. c. 25, p. 40.

(o) Spelm. Gloss. 145.

(p) See Book 1, ch. 3.

(5) See the reference given in the last note.

(6) But see *ante*, p. 48, note. If William I. acquired a just title to

The difference in effect, between the acquisition of an estate by descent and by purchase, consists principally in these two points: 1. That by purchase the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, and not the blood only of some particular ancestor. For, when a man takes an estate by purchase, he takes it not *ut feudum paternum* or *maternum*, which would descend only to the heirs by the father's or the mother's side: but he takes it *ut feudum antiquum* (7), as a feud of indefinite antiquity; whereby it becomes inheritable to his heirs general, first of the paternal, and then of the maternal line. 2. An estate taken by purchase will not make the heir answerable for the acts of the ancestor, as an estate by descent will. For, if the ancestor, by any deed, obligation, covenant, or the like, bindeth himself and his heirs, and dieth; this deed, obligation, or covenant, shall be binding upon the heir, so far forth only as he (or any other in trust for him (q)) had any estate of inheritance vested in him by descent *from (or any estate *pur autre vie* coming to him by special occupancy, as heir to (r)) that ancestor, sufficient to answer the charge (s); whether he remains in possession, or hath aliened it before action brought (t); which sufficient estate is in the law called *assets*; from the French word, *assez*, enough (u). Therefore, if a man covenants, for himself and his heirs, to keep my house in repair, I can then (and then only) compel his heir to perform this covenant, when he has an estate sufficient for this purpose, or *assets*, by descent from the covenantor: for though the covenant descends to the heir, whether he inherits any estate or no, it lies dormant, and is not compulsory, until he has assets by descent (v).

The difference between acquisition by descent and by purchase.

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This is the legal signification of the word *perquisitio*, or purchase; and in this sense it includes the five following methods of acquiring a title to estates: 1. Escheat (8). 2.

Methods of acquiring title included in the term *purchase*.

(q) Stat. 29 Car. II. c. 3, s. 10.

(r) Ibid. s. 12.

(s) 1 P. Wms. 777.

(t) Stat. 3 & 4 W. & M. c. 14.

(u) Finch, Law, 119.

(v) Finch, Rep. 86.

the *crown* by victory, it sounds very like a verbal subtlety to say, he had no such title to the *realm*.

(7) But see *ante*, the note to p. 222.

(8) As to the impropriety of considering escheats, in every case, under the head of title by purchase, see *ante*, p. 201, note. If the escheat is an ac-

Occupancy. 3. Prescription. 4. Forfeiture. 5. Alienation. Of all these in their order.

I. *Escheat*.

I. Escheat, we may remember (*w*), was one of the fruits and consequences of feudal tenure. The word itself is originally French or Norman (*x*), in which language it signifies chance or accident; and with us it denotes an obstruction of the course of descent, and a consequent determination of the tenure, by some unforeseen contingency: in which case the land naturally results back, by a kind of reversion, to the original grantor or lord of the fee (*y*).

The nature of title by escheat.

Escheat therefore, being a title frequently vested in the lord by inheritance, as being the fruit of a signiory, to which he was entitled by descent, (for which reason the lands escheating shall attend the signiory, and be inheritable by such only of his heirs as are capable of inheriting the other (*z*)(9),) it may seem in such cases to fall more properly under the former general head of acquiring title to estates, *viz.* by descent, (being vested in him by act of law, and not by his own act *or agreement,) than under the present by purchase. But it must be remembered that, in order to complete this title by escheat, it is necessary that the lord perform an act of his own, by *entering* on the lands and tenements so escheated, or suing out a *writ of escheat* (*a*): on failure of which, or by doing any act that amounts to an implied waiver of his right, as by accepting homage or rent of a stranger who usurps the possession, his title by escheat is

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(*w*) See pag. 72.

(*y*) 1 Feud. 86; Co. Litt. 13.

(*x*) *Eschet* or *échet*, formed from the verb *eschoir* or *échoir*, to happen.

(*z*) Co. Litt. 13.

(*a*) Bro. Abr. tit. Escheat, 26.

cessory of land or a seignory taken by descent, the escheat ought not to be considered as a purchase. It may be added, that escheats do not answer to the description given by our author, in the last page, of the effects of the acquisition of an estate by purchase; for, the inheritable quality of the lands escheated, as we are taught in the present page, and as the statute of 3 & 4 Gul. IV. c. 106, implies, follows the nature of the seignory, and does not attach in the person of the lord to

whom the escheat falls. Nor are the lands exempt from the acts of the ancestor, from whom the seignory descends, or from the incumbrances of the last tenant. (*Earl of Bedford's case*, 7 Rep. 6; *Smalman v. Agborough*, 1 Roll. Rep. 402.)

(9) Fitzherbert, (N. B. 144, D,) says, in substance, that if the lord dies before the writ of escheat is sued out, his heir will be entitled to the writ; because by the escheat a descendible right accrued.

barred (*b*). It is, therefore, in some respect a title acquired by his own act, as well as by act of law. Indeed, this may also be said of descents themselves, in which an entry or other seisin is required, in order to make a complete title; and therefore this distribution of titles by our legal writers, into those by descent and by purchase, seems in this respect rather inaccurate, and not marked with sufficient precision: for, as escheats must follow the nature of the signiory to which they belong, they may vest by either purchase or descent, according as the signiory is vested. And, though Sir Edward Coke considers the lord by escheat as in some respects the assignee of the last tenant (*c*), and therefore taking by purchase; yet, on the other hand, the lord is more frequently considered as being *ultimus hæres*, and therefore taking by descent in a kind of caducary succession.

The law of escheats is founded upon this single principle, that the blood of the person last seised in fee-simple is, by some means or other, utterly extinct and gone: and, since none can inherit his estate but such as are of his blood and consanguinity, it follows as a regular consequence, that when such blood is extinct, the inheritance itself must fail; the land must become what the feudal writers denominate *feudum apertum*, and must result back again to the lord of the fee, by whom, or by those whose estate he hath, it was given (10).

The principle of the law of escheats.

Escheats are frequently divided into those *propter defectum sanguinis*, and those *propter delictum tenentis*: the one sort, if the tenant dies without heirs; the other, if his blood be attainted (*d*) (11). But both these species may well be *comprehended under the first denomination only; for he that is attainted (12) suffers an extinction of his blood, as well as he that dies without relations. The inheritable quality

Escheats are of two kinds—the one, where the tenant dies without heirs; the other, where his blood is attainted.

[* 246]

(*b*) Bro. Abr. tit. Acceptance, 25; Co. Litt. 268.

(*c*) 1 Inst. 215.

(*d*) Co. Litt. 13, 92.

(10) See *ante*, the note to p. 73.

ante, the note to p. 201, *ad fin.*

(11) When trust estates escheat, by the failure of heirs to the trustee, or his attainder, the legal rights of the lord of the fee are now subjected to the control of the Court of Chancery. See

(12) As to the relaxation of the doctrine of attainder, which has taken place in modern times, see *ante*, the note to p. 72.

is expunged in one instance, and expires in the other; or, as the doctrine of escheats is very fully expressed in *Fleta* (e), "*dominus capitalis feodi loco hæredis habetur, quoniam ties per defectum vel delictum extinguitur sanguis tenentis.*"

Illustration of the doctrine of escheats.

Escheats, therefore, arising merely upon the deficiency of the blood, whereby the descent is impeded, their doctrine will be better illustrated by considering the several cases wherein hereditary blood may be deficient, than by any other method whatsoever.

Where the tenant dies—

1. without any relations of any of his ancestors;

2. or, of those from whom the estate descended;

3. or, of the whole blood.

1, 2, 3. The first three cases, wherein inheritable blood is wanting, may be collected from the rules of descent laid down and explained in the preceding chapter, and therefore will need very little illustration or comment. First, when the tenant dies without any relations on the part of any of his ancestors; secondly, when he dies without any relations on the part of those ancestors from whom his estate descended; thirdly, when he dies without any relations of the whole blood (13). In two of these cases the blood of the first purchasor is certainly, in the other it is probably, at an end; and, therefore, in all of them, the law directs, that the land shall escheat to the lord of the fee; for the lord would be manifestly prejudiced, if, contrary to the inherent condition tacitly annexed to all feuds, any person should be suffered to succeed to the lands, who is not of the blood of the first feudatory, to whom, for his personal merit, the estate is supposed to have been granted (14).

(e) L. 6, c. 1.

(13) See the statute cited *ante*, in the note to p. 222, and recollect, throughout the whole of this chapter, that the law of inheritance has, by the said statute, been greatly amended.

(14) See *ante*, p. 56, and the notes thereto; as also p. 108. The important case of *Burgess v. Wheate*, 1 Eden, 177—261, was to the following purport. A. being seised in fee *ex parte paternâ*, conveyed to trustees, in trust for herself, her heirs and assigns, to the intent that she might dispose thereof as she should by her will or other writing appoint. A. died without making any appointment, and

without heirs *ex parte paternâ*. It was held by Lord Keeper Henley, (afterwards Northington,) as well as by Sir Thomas Clarke, M. R., and by Lord Mansfield, C. J. (whose assistance the Lord Keeper had requested,) that the heir *ex parte maternâ* was clearly not entitled. But Lord Mansfield thought the crown was entitled by escheat; or, if that were not so under the circumstances, then that, as between the maternal heir and the trustee, the former was entitled. This opinion, however, was contrary to that of the Lord Keeper and of the Master of the Rolls; and it was decided, that

4. A monster, which hath not the shape of mankind, but in any part evidently bears the resemblance of the brute creation, hath no inheritable blood, and cannot be heir to any land, albeit it be brought forth in marriage: but, although it hath deformity in any part of its body, yet, if it *hath human shape, it may be heir (*f*). This is a very ancient rule in the law of England (*g*); and its reason is too obvious, and too shocking, to bear a minute discussion. The Roman law agrees with our own in excluding such births from successions (*h*), yet accounts them, however, children in some respects, where the parents, or at least the father, could reap any advantage thereby (*i*); (as the *jus trium liberorum*, and the like;) esteeming them the misfortune, rather than the fault, of that parent. But our law will not admit a birth of this kind to be such an issue, as

4. A monster without human shape cannot be heir to any land.

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(*f*) Co. Litt. 7, 8.

(*g*) *Qui contra formam humani generis converso more procreantur, ut si mulier monstrosus vel prodigiosus enixa sit, inter liberos non computantur. Partus tamen, cui natura aliquantulum addiderit vel diminuerit, ut si sex vel tantum quatuor digitos ha-*

buerit, bene debet inter liberos connumerari; et, si membra sint inutilia aut tortuosa, non tamen est partus monstrosus. Bract. l. 1, c. 6, & l. 5, tr. 5, c. 30.

(*h*) Ff. 1, 5, 14.

(*i*) Ff. 50, 16, 135; Paul. 4, sent. 9, s. 63.

there being a *terre tenant*, (*Barclay v. Russel*, 3 Ves. 430,) the crown, claiming by escheat, had not a title by *subpœna* to compel a conveyance from the trustee, the trust being absolutely determined. Upon the right of the trustee it was not necessary, for the determination of the question before the court, to pronounce any positive judgment. It should seem, however, that he would have received no assistance from equity in support of his claims. (*Williams v. Lord Lonsdale*, 3 Ves. 757.) And clearly, a trustee not having the legal estate in lands purchased with trust monies, cannot hold against the crown claiming by escheat. (*Walker v. Denne*, 2 Ves. jun. 170.)

In the case last cited, the court is reported to have said, that "copyhold cannot escheat to the crown;" but this *dictum*, in all probability, however applicable to the instance then under

consideration, was not intended to be understood as a general proposition. Copyholds holden of a manor, whereof a subject is lord, will escheat to him certainly, and not to the crown; but the 12th section of the statute of 39 & 40 Geo. III. c. 88, after reciting that "divers lands, tenements, and hereditaments, as well freehold as *copyhold*, have escheated and may escheat" to the crown, enacts, that "it shall be lawful to direct by warrant under the sign manual the execution of any trusts to which the lands so escheated were liable at the time of the escheat, or to which they would have been liable in the hands of a subject, and to make such grants of the lands so escheated as to the sovereign shall seem meet." It is probable that the law of escheat will be simplified by the legislature during the present session of parliament (1836).

shall entitle the husband to be tenant by the curtesy (*k*); because it is not capable of inheriting. And therefore, if there appears no other heir than such a prodigious birth, the land shall escheat to the lord.

5. Bastards are incapable of being heirs.

5. Bastards are incapable of being heirs. Bastards, by our law, are such children as are not born either in lawful wedlock, or within a competent time after its determination (*l*). Such are held to be *nullius filii*, the sons of nobody; for the maxim of law is, *qui ex damnato coitu nascuntur, inter liberos non computantur* (*m*). Being thus the sons of nobody, they have no blood in them, at least no inheritable blood (15); consequently, none of the blood of the first purchasor: and therefore, if there be no other claimant than such illegitimate children, the land shall escheat to the lord (*n*). The civil law differs from ours in this point, and allows a bastard to succeed to an inheritance, if after its birth the mother was married to the father (*o*): and also, if the father had no lawful wife or child, then, even if the concubine was never married to the father, yet she and her bastard son were admitted each to one-twelfth of the inheritance (*p*): and a bastard was likewise *capable of succeeding to the whole of his mother's estate, although she was never married; the mother being sufficiently certain, though the father is not (*q*). But our law, in favour of marriage, is much less indulgent to bastards.

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Excepted case.

There is, indeed, one instance, in which our law has shewn them some little regard; and that is usually termed the case of *bastard eignè* and *mulier puisnè*. This happens when a man has a bastard son, and afterwards marries the mother, and by her has a legitimate son, who, in the language of the law, is called a *mulier*, or as Glanvil (*r*) expresses it in his Latin *filius mulieratus*; the woman before marriage being *concubina*, and afterwards *mulier*. Now here the eldest son is bastard, or *bastard eignè*; and the younger son is legitimate, or *mulier puisnè*. If then the father dies, and the *bastard eignè* enters upon his land, and enjoys it

(*k*) Co. Litt. 29.

(*l*) See Book I. c. 16.

(*m*) Co. Litt. 8.

(*n*) Finch, Law, 117.

(*o*) Nov. 89, c. 8.

(*p*) Ibid. c. 12.

(*q*) Cod. 6, 57, 5.

(*r*) L. 7, c. 1.

(15) See *ante*, the note to p. 222.

to his death, and dies seised thereof, whereby the inheritance descends to his issue; in this case the *mulier puisné* and all other heirs, (though minors, feme-coverts, or under any incapacity whatsoever,) are totally barred of their right (s). And this, 1. As a punishment on the *mulier* for his negligence, in not entering during the *bastard's* life, and evicting him. 2. Because the law will not suffer a man to be bastardized after his death, who entered as heir and died seised, and so passed for legitimate in his lifetime. 3. Because the canon law (following the civil) did allow such *bastard eigné* to be legitimate on the subsequent marriage of his mother; and therefore the laws of England (though they would not admit either the civil or canon law to rule the inheritances of this kingdom, yet) paid such a regard to a person thus peculiarly circumstanced, that, after the land had descended to his issue, they would not unravel the matter again, and suffer his estate to be shaken. But this indulgence was shewn to no other kind of bastard; for, if the mother was never married to the father, such bastard could have no colourable title at all (t).

*As bastards cannot be heirs themselves, so neither can [* 249] they have any heirs but those of their own bodies. For, as all collateral kindred consists in being derived from the same common ancestor, and as a bastard has no legal ancestors, he can have no collateral kindred (16); and, consequently, can have no legal heirs, but such as claim by a lineal descent from himself. And therefore, if a bastard purchases land, and dies seised thereof without issue, and intestate, the land shall escheat to the lord of the fee (u).

So, they can have no collateral kindred.

6. Aliens (v), also, are incapable of taking by descent, or inheriting (w): for they are not allowed to have any inheritable (17) blood in them: rather indeed upon a principle of national or civil policy, than upon reasons strictly feudal.

6. Aliens.

(s) Litt. s. 399; Co. Litt. 244.

(v) See Book I. c. 10.

(t) Litt. s. 400.

(w) Co. Litt. 8.

(u) Bract. l. 2, c. 7; Co. Litt. 244.

(16) See *ante*, the notes to pp. 222 and 246.

(17) But, a natural born subject may inherit and make title by descent from ancestors, lineal or collateral, al-

though an ancestor through whom he must derive his pedigree was an alien.

(See the statutes of 11 & 12 Will. III. c. 6, and 25 Geo. II. c. 39, cited in the next page.)

Though, if lands had been suffered to fall into their hands who owe no allegiance to the crown of England, the design of introducing our feuds, the defence of the kingdom, would have been defeated. Wherefore, if a man leaves no other relations but aliens, his land shall escheat to the lord.

Who can neither hold by purchase nor by inheritance.

As aliens cannot inherit, so far they are on a level with bastards; but as they are also disabled to hold by purchase (*x*), they are under still greater disabilities. And, as they can neither hold by purchase, nor by inheritance, it is almost superfluous to say that they can have no heirs, since they can have nothing for an heir to inherit; but so it is expressly holden (*y*), because they have not in them any inheritable blood.

An alien made a denizen by letters patent, may purchase lands; but his son born before his denization, cannot inherit them.

And farther, if an alien be made a denizen by the king's letters patent, and then purchases lands, (which the law allows such a one to do,) his son, born before his denization, shall not (by the common law) inherit those lands; but a son born afterwards may, even though his elder brother be living; for the father, before denization, had no inheritable blood to communicate to his eldest son; but by denization it acquires *an hereditary quality, which will be transmitted to his subsequent posterity. Yet if he had been naturalized by act of parliament, such eldest son might then have inherited; for that cancels all defects, and is allowed to have a retrospective energy, which simple denization has not (*z*).

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If the father be naturalized by act of parliament, the son may inherit.

Though formerly held otherwise, it is now settled, that the sons of an alien, born in this country, may inherit to each other.

Sir Edward Coke (*a*) also holds, that if an alien cometh into England, and there hath issue two sons, who are thereby natural-born subjects; and one of them purchases land, and dies; yet neither of these brethren can be heir to the other. For the *commune vinculum*, or common stock of their consanguinity, is the father; and as he had no inheritable blood in him, he could communicate none to his sons; and, when the sons can by no possibility be heirs to the father, the one of them shall not be heir to the other. And this opinion of his seems founded upon solid principles of the ancient law; not only from the rule before cited (*b*), that *cestuy que doit inheriter al pere, doit inhe-*

(*x*) Co. Litt. 2.

(*a*) 1 Inst. 8.

(*y*) Ibid.; 1 Lev. 59.

(*b*) See pag. 223 and 239.

(*z*) Co. Litt. 129.

riter al fits; but also because we have seen that the only feodal foundation, upon which newly purchased land can possibly descend to a brother, is the supposition and fiction of law, that it descended from some one of his ancestors; but, in this case, as the immediate ancestor was an alien, from whom it could by no possibility descend, this should destroy the supposition, and impede the descent, and the land should be inherited *ut feudum stricte novum*; that is, by none but the lineal descendants of the purchasing brother; and on failure of them, should escheat to the lord of the fee. But this opinion hath been since overruled (c): and it is now held for law, that the sons of an alien born here, may inherit to each other; the descent from one brother to another being an *immediate* (18) descent (d). And reasonably enough upon the whole; for, as (in common purchases) the whole of the supposed descent from indefinite ancestors is but fictitious, the law may as well suppose the requisite ancestor as suppose the requisite descent (19).

*It is also enacted, by the statute 11 & 12 W. III. c. 6, that all persons being natural-born subjects of the king, may inherit and make their titles by descent from any of their ancestors, lineal or collateral; although their father or mother, or other ancestor, by, from, through, or under whom they derive their pedigrees, were born out of the king's allegiance. But inconveniences were afterwards apprehended, in case persons should thereby gain a future capacity to inherit, who did not exist at the death of the person last seised. As, if Francis the elder brother of John Stiles be an alien, and Oliver the younger be a natural-born subject, upon John's death without issue his lands will descend to Oliver the younger brother: now, if after-

Statutory enactments on this subject.

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(c) 1 Ventr. 413; 1 Lev. 59; 1 Sid. 193.

(d) See pag. 226.

(18) See *ante*, p. 208, note (9) to chapter 14.

(19) It is very true, that, in common purchases, the whole supposition of descent from indefinite ancestors is fictitious; and also, that the law may as well suppose the requisite ancestor, as suppose the requisite descent: but, whether either of these suppositions

be "reasonable enough," is another question. See *ante*, p. 222.

Since this note was first published, it has been enacted by the statute of 3 & 4 Gul. IV. c. 106, that, in every case of descent, the person last entitled to the land shall be considered to have been the purchaser thereof, unless the contrary be proved.

wards Francis has a child born in England, it was feared that, under the statute of king William, this new-born child might defeat the estate of his uncle Oliver. Wherefore it is provided, by the statute 25 Geo. II. c. 39, that no right of inheritance shall accrue by virtue of the former statute to any persons whatsoever, unless they are in being and capable to take as heirs at the death of the person last seised:—with an exception however to the case, where lands shall descend to the daughter of an alien; which descent shall be divested in favour of an after-born brother, or the inheritance shall be divided with an after-born sister or sisters, according to the usual rule (*d*) of descents by the common law.

Of attainder.

7. By attainder (20) also, for treason or other felony, the blood of the person attainted is so corrupted, as to be rendered no longer inheritable.

Distinction between forfeiture of lands to the king, and escheat to the lord on attainder.

Great care must be taken to distinguish between forfeiture of lands to the king, and this species of escheat to the lord; which, by reason of their similitude in some circumstances, and because the crown is very frequently the immediate lord of the fee, and therefore entitled to both, have been often confounded together. Forfeiture of lands, and of whatever else the offender possessed, was the doctrine of the old Saxon law (*e*), as a part of punishment for the offence; *and does not at all relate to the feudal system, nor is the consequence of any signiory or lordship paramount (*f*): but, being a prerogative vested in the crown, was neither superseded nor diminished by the introduction of the Norman tenures; a fruit and consequence of which escheat must undoubtedly be reckoned. Escheat therefore operates in subordination to this more ancient and superior law of forfeiture.

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The doctrine of escheat upon attainder considered.

The doctrine of escheat upon attainder, taken singly, is this: that the blood of the tenant, by the commission of any felony, (under which denomination all treasons were formerly comprised (*g*),) is corrupted and stained, and the

(*d*) See pag. 208 and 214.

(*f*) 2 Inst. 64; Salk. 85.

(*e*) LL. Aelfred, c. 4; LL. Canut. c. 54.

(*g*) 3 Inst. 15; Stat. 25 Edw. III. c. 2, s. 12.

(20) See the statutes referred to *ante*, in the note to p. 72, and *post*, in the note to p. 256.

original donation of the feud is thereby determined, it being always granted to the vassal on the implied condition of *dum bene se gesserit*. Upon the thorough demonstration of which guilt, by legal attainder, the feudal covenant and mutual bond of fealty are held to be broken, the estate instantly falls back from the offender to the lord of the fee, and the inheritable quality of his blood is extinguished and blotted out for ever (21). In this situation the law of feudal escheat was brought into England at the conquest; and in general superadded to the ancient law of forfeiture. In consequence of which corruption and extinction of hereditary blood, the land of all felons would immediately revest in the lord, but that the superior law of forfeiture intervenes, and intercepts it in its passage: in case of treason for ever; in case of other felony, for only a year and a day; after which time it goes to the lord in a regular course of escheat (*h*), as it would have done to the heir of the felon in case the feudal tenures had never been introduced. And that this is the true operation and genuine history of escheats will most evidently appear from this incident to gavelkind lands, (which seems to be the old Saxon tenure,) that they are in no case subject to escheat for felony (22), though they are liable to forfeiture for treason (*i*).

*As a consequence of this doctrine of escheat, all lands [* 253] of inheritance immediately revesting in the lord, the wife of the felon was liable to lose her dower, till the statute 1 Edw. VI. c. 12, enacted, that albeit any person be attainted of misprision of treason, murder, or felony, yet his wife shall enjoy her dower. But she has not this indulgence where the ancient law of forfeiture operates; for it is expressly provided by the statute 5 & 6 Edw. VI. c. 11, that the wife of one attaint of high treason shall not be endowed at all.

By 1 Edw. VI. c. 12, the wife of a felon is entitled to dower; but not so the wife of one attainted of high treason.

Hitherto we have only spoken of estates vested in the offender, at the time of his offence or attainder. And here the law of forfeiture stops; but the law of escheat pursues the matter still farther. For, the blood of the tenant being

The different effects of forfeiture and escheat.

(*h*) 2 Inst. 36.

(*i*) Somner, 53; Wright Ten. 118.

(21) But see the references given in the last note.

(22) See *ante*, chapter 6, page 84.

utterly corrupted and extinguished, it follows not only that all that he now has shall escheat from him, but also that he shall be incapable of inheriting any thing for the future. This may farther illustrate the distinction between forfeiture and escheat. If therefore a father be seised in fee, and the son commits treason and is attainted, and then the father dies: here the lands shall escheat to the lord; because the son, by the corruption of his blood, is incapable to be heir, and there can be no other heir during his life (23); but nothing shall be forfeited to the king, for the son never had any interest in the lands to forfeit (*k*). In this case the escheat operates, and not the forfeiture; but in the following instance the forfeiture works, and not the escheat. As where a new felony is created by act of parliament, and it is provided (as is frequently the case) that it shall not extend to corruption of blood; here the lands of the felon shall not escheat to the lord, but yet the profits of them shall be forfeited to the king for a year and a day, and so long after as the offender lives (*l*).

The corruption of the hereditary blood of a person attainted formerly extended to all his posterity.

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There is yet a farther consequence of the corruption and extinction of hereditary blood, which is this: that the person *attainted shall not only be incapable himself of inheriting, or transmitting his own property by heirship, but shall also obstruct the descent of lands or tenements to his posterity, in all cases where they are obliged to derive their title through him from any remoter ancestor. The channel which conveyed the hereditary blood from his ancestors to him, is not only exhausted for the present, but totally dammed up and rendered impervious for the future. This is a refinement upon the ancient law of feuds, which allowed that the grandson might be heir to his grandfather, though the son in the intermediate generation was guilty of felony (*m*). But, by the law of England, a man's blood is so universally corrupted (24) by attainder, that his sons

(*k*) Co. Litt. 13.

(*l*) 3 Inst. 47.

(*m*) Van Leeuwen in 2 Feud. 31.

(23) Our author, however, in page 249, states a case in which, even under the old law, a man's eldest son might be living, and yet not he, but his younger brother, be his father's

heir; and see *post*, p. 255.

(24) But see now the statutes of 54 Geo. III. c. 145, and of 3 & 4 Gul. IV. c. 106, before referred to, and in part cited, in the note to p. 256.

can neither inherit to him nor to any other ancestor (*n*), at least on the part of their attainted father.

This corruption of blood cannot be absolutely removed but by authority of parliament. The king may excuse the public punishment of an offender; but cannot abolish the private right, which has accrued or may accrue to individuals as a consequence of the criminal's attainder. He may remit a forfeiture, in which the interest of the crown is alone concerned; but he cannot wipe away the corruption of blood; for therein a third person hath an interest, the lord who claims by escheat. If, therefore, a man hath a son, and is attainted, and afterwards pardoned by the king; this son can never inherit to his father, or father's ancestors; because his paternal blood, being once thoroughly corrupted by his father's attainder, must continue so: but if the son had been born after the pardon, he might inherit; because by the pardon the father is made a new man, and may convey new inheritable blood to his after-born children (*o*).

Herein there is, however, a difference between aliens and persons attainted. Of aliens, who could never by any possibility be heirs, the law takes no notice: and therefore we have *seen, that an alien elder brother shall not impede the descent to a natural-born younger brother. But in attainders it is otherwise: for if a man hath issue a son, and is attainted, and afterwards pardoned, and then hath issue a second son, and dies; here the corruption of blood is not removed from the eldest, and therefore he cannot be heir; neither can the youngest be heir, for he hath an elder brother living, of whom the law takes notice, as he once had a possibility of being heir; and therefore the younger brother shall not inherit, but the land shall escheat to the lord: though, had the elder died without issue in the life of the father, the younger son born after the pardon might well have inherited, for he hath no corruption of blood (*p*). So, if a man hath issue two sons, and the elder in the lifetime of the father hath issue, and then is attainted and executed, and afterwards the father dies, the lands of the father shall not descend to the younger son: for the issue of the elder, which had once a possibility to inherit, shall impede the

Difference between aliens and persons attainted.

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(*n*) Co. Litt. 391.

(*o*) Ibid. 392.

(*p*) Ibid. 8.

descent to the younger, and the land shall escheat to the lord (*q*). Sir Edward Coke in this case allows (*r*), that if the ancestor be attainted, his sons born before the attainder may be heirs to each other; and distinguishes it from the case of the sons of an alien, because in this case the blood was inheritable when imparted to them from the father; but he makes a doubt (upon the principles before mentioned, which are now over-ruled) (*s*) whether sons, born after the attainder, can inherit to each other, for they never had any inheritable blood in them.

Consequences of
attainder, under
the old law.

Upon the whole it appears, that a person attainted is neither allowed to retain his former estate, nor to inherit any future one, nor to transmit any inheritance to his issue, either immediately from himself, or mediately through himself from any remoter ancestor; for his inheritable blood, which is necessary either to hold, to take, or to transmit any feudal property, is blotted out, corrupted, and extinguished for ever: the consequence of which is, that estates thus impeded in their descent, result back and escheat to the lord.

The effect of
corruption of the
blood, by felony,
or attainder, re-
strained and
qualified by cer-
tain statutes.

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*This corruption of blood, thus arising from feudal principles, but perhaps extended farther than even those principles will warrant, has been long looked upon as a peculiar hardship: because the oppressive parts of the feudal tenures being now in general abolished, it seems unreasonable to reserve one of their most inequitable consequences; namely, that the children should not only be reduced to present poverty, (which, however severe, is sufficiently justified upon reasons of public policy,) but also be laid under future difficulties of inheritance, on account of the guilt of their ancestors. And therefore, in most (if not all) of the new felonies created by parliament since the reign of Henry the eighth, it is declared, that they shall not extend to any corruption of blood: and by the statute 7 Ann. c. 21, (the operation of which is postponed by the statute 17 Geo. II. c. 39,) it is enacted, that, after the death of the late pretender, and his sons, no attainder for treason shall extend to the disinheriting any heir, nor the prejudice of any person, other than the offender himself: which pro-

(*q*) Dyer, 48.

(*r*) Co. Litt. 8.

(*s*) 1 Hal. P. C. 357.

visions have, indeed, carried the remedy farther (25) than was required by the hardship above complained of; which is only the future obstruction of descents, where the pedigree happens to be deduced through the blood of an attainted ancestor.

Before I conclude this head of escheat, I must mention one singular instance in which lands held in fee-simple are not liable to escheat to the lord, even when their owner is no more, and hath left no heirs to inherit them. And this is the case of a corporation; for if that comes by any accident to be dissolved, the donor or his heirs shall have the land again in reversion, and not the lord by escheat; which is, perhaps, the only instance where a reversion can be expectant on a grant in fee-simple absolute. But the law, we are told (*t*), doth tacitly annex a condition to every such gift or grant, that if the corporation be dissolved, the donor or grantor shall re-enter; for the cause of the gift or grant *faileth. This is, indeed, founded upon the self-same principle as the law of escheat; the heirs of the donor being only substituted instead of the chief lord of the fee: which was formerly very frequently the case in subinfeudations, or alienations of lands by a vassal to be holden as of himself, till that practice was restrained by the statute of *quia emptores*, 18 Edw. I. st. 1, to which this very singular (26) instance still, in some degree, remains an exception.

In the case of a corporation, if it be dissolved, the donor or his heirs shall have the land again, and not the lord by escheat.

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There is one more incapacity of taking by descent, which not being productive of any escheat, is not strictly reducible to this head, and yet must not be passed over in silence. It is enacted by the statute 11 & 12 Will. III. c. 4, (27) that every papist who shall not abjure the errors

Formerly papists were incapable of inheriting lands.

(*t*) Co. Litt. 13.

(25) The statute of 54 Geo. III. c. 145, took away corruption of blood, in all cases except the crimes of treason, petit treason, or murder, and the statute of 3 & 4 Gul. IV. c. 106, s. 10, enacts, that after the death of a person attainted, any one may inherit, notwithstanding he is obliged to trace his descent through the person attainted, provided the claimant's title is open to no other objection.

(26) The instance mentioned in the text is not absolutely a singular one, if it be law, as intimated in 1 Roll's Ab. 816, pl. 6, that an advowson in gross will revert to the grantor for want of heirs of the grantee: or, if not to the grantor, yet the king will have it as supreme patron, and not as an escheat.

(27) Mr. Christian observes, "this act was repealed by the 18 Geo. III.

of his religion by taking the oaths to government, and making the declaration against transubstantiation, within six months after he has attained the age of eighteen years, shall be incapable of inheriting, or taking, by descent, as well as purchase, any real estates whatsoever; and his next of kin being a protestant, shall hold them to his own use till such time as he complies with the terms imposed by the act. This incapacity is merely personal; it affects himself only, and does not destroy the inheritable quality of his blood, so as to impede the descent to others of his kindred. In like manner as, even in the times of popery, one who entered into religion and became a monk professed was incapable of inheriting lands, both in our own (*u*) and the feudal law; *eo quod desiit esse miles seculi qui factus est miles Christi: nec beneficium pertinet ad eum qui non debet gerere officium* (*w*). But yet he was accounted only *civiliter mortuus*; he did not impede the descent to others, but the next heir was entitled to his or his ancestor's estate.

These are the several deficiencies of hereditary blood, recognized by the law of England; which, so often as they happen, occasion lands to escheat to the original proprietary or lord.

(*u*) Co. Litt. 132.

(*w*) 2 Feud. 21.

c. 6, so far as to permit such Roman Catholics to inherit real property, as would take the oath of allegiance prescribed in the statute; which is the same oath that is directed to be taken by the 31 Geo. III. c. 32; which has repealed all the other odious restrictions upon those who profess the Ro-

man Catholic religion." [Since Mr. Christian wrote, liberality has been making further progress, and many restrictions, which Mr. Christian did not consider odious, have been removed. See stat. 10 Geo. IV. c. 7, and *ante*, the notes to Vol. I. pp. 230, 368.—ED.]

CHAPTER XVI.

OF TITLE BY OCCUPANCY.

OCCUPANCY is the taking possession of those things, which before belonged to nobody. This, as we have seen (a), is the true ground and foundation of all property, or of holding those things in severalty, which, by the law of nature, unqualified by that of society, were common to all mankind. But, when once it was agreed that every thing capable of ownership should have an owner, natural reason suggested, that he who could first declare his intention of appropriating any thing to his own use, and, in consequence of such intention, actually took it into possession, should thereby gain the absolute property of it; according to that rule of the law of nations, recognized by the laws of Rome (b), *quod nullius est, id ratione naturali occupanti conceditur*.

Of title by occupancy.

This right of occupancy, so far as it concerns real property, (for of personal chattels I am not in this place to speak,) hath been confined by the laws of England within a very narrow compass; and was extended only to a single instance: namely, where a man was tenant *pur auter vie*, or had an estate granted to himself only (without mentioning his heirs) for the life of another man, and died during the life of *cestuy que vie*, or him by whose life it was holden: in this case, he that could first enter on the land, might lawfully retain the possession, so long as *cestuy que vie* lived, by right of occupancy (c).

*This seems to have been recurring to first principles, and

(a) See pag. 3 & 8, and the next page.

(b) Ff. 41, 1, 3.

(c) Co. Litt. 41.

calling in the law of nature (1) to ascertain the property of the land, when left without a legal owner. For it did not revert to the grantor, though it formerly (*d*) was supposed so to do; for he had parted with all his interest, so long as *cestuy que vie* lived: it did not escheat to the lord of the fee, for all escheats must be of the absolute entire fee, and not of any particular estate carved out of it: much less of so minute a remnant as this: it did not belong to the grantee; for he was dead: it did not descend to his heirs; for there were no words of inheritance in the grant: nor could it vest in his executors; for no executors could succeed to a freehold. Belonging therefore to nobody, like the *hæreditas jacens* of the Romans, the law left it open to be seized and appropriated by the first person that could enter upon it, during the life of *cestuy que vie*, under the name of an occupant. But there was no right of occupancy allowed, where the king had the reversion of the lands: for the reversioner hath an equal right with any other man to enter upon the vacant possession, and where the king's title and a subject's concur, the king's shall be always preferred: against the king therefore there could be no prior occupant, because *nulum tempus occurrit regi* (*e*). And, even in the case of a subject, had the estate *pur auter vie* been granted to a man and his heirs during the life of *cestuy que vie*, there the heir might, and still may enter and hold possession, and is called in law a *special occupant*: as having a special exclusive right, by the terms of the original grant, to enter upon and occupy this *hæreditas jacens*, during the residue of the estate granted; though some have thought him so called with no very great propriety (*f*); and that such estate is rather a descendible freehold. But the title of common occupancy is now reduced almost to nothing by two statutes: the one 29 Car. II. c. 3, which enacts (according to the ancient rule of

(*d*) Bract. l. 2, c. 9; l. 4, tr. 3,
c. 9, s. 4; Flet. l. 3, c. 12, s. 6; l. 5,
c. 5, s. 15.

(*e*) Co. Litt. 41.

(*f*) Vaugh. 201.

(1) Here, our author thinks "the property in land may be ascertained by the law of nature;" in the last

page, and elsewhere, he holds that, "by the law of nature, it is common to all mankind."

law (g)) that where there is no special occupant (2), in whom the estate may vest, the tenant *pur auter vie* may de-

(g) Bract. 1. 2, c. 9; 1. 4, tr. 3, c. 9, s. 4; Flet. 1. 3, c. 12, s. 6; 1. 5, c. 5, s. 15.

(2) Whether under a grant to a man and his executors, of lands *pur autre vie*, the executors can take as special occupants, appears to be not very clearly settled. In *Milner v. Lord Harewood*, (18 Ves. 273,) Lord Eldon seems to say, an executor may be a special occupant; but in *Ripley v. Waterworth*, (7 Ves. 438,) the same learned Judge treated that as, at all events, a doubtful point. Every estate *pur autre vie* in the hands of an executor, (who takes *qua* executor only,) will be assets in his hands. (*Westfaling v. Westfaling*, 3 Atk. 466; *Ripley v. Waterworth*, *ubi supra*.) And where there is no special occupant, an estate held by lease *pur autre vie*, will go to the executors or administrators of the lessee; and in *their* hands such a lease was always considered as personal estate, at least to the extent of being assets: (*Duke of Devonshire v. Kinton*, 2 Vern. 719:) though, in other respects, it was formerly held to retain the character of freehold, so completely as not to be distributable under the intestacy of the deceased tenant *pur autre vie*: (*Oldham v. Pickering*, Carthew, 376:) but this last point seems now settled definitively to the contrary, by the statute of 14 Geo. II. c. 20, and indeed Lord Eldon (in *Ripley v. Waterworth*, 7 Ves. 439,) thought it "not a great stretch" to say that the statute of Cha. II. was meant to apply both to testacy and intestacy.

But though an estate *pur autre vie*, granted to a man, his *executors*, administrators and assigns, if there be no special occupant, is distributable as personal estate, it does not become personal estate strictly speaking; nor does it become liable to that applica-

tion till after the death of the party; and then not by force of any property inherent in the estate itself, but by force of the statute, to avoid the inconvenience of general occupancy. In the life of the party such an estate must be considered freehold estate. (*Watkins v. Lee*, 6 Ves. 642.) And when an estate *pur autre vie* has been limited to a man, his *heirs* and assigns, if it be not devised, it goes to the heir, and is liable to debts in the same order as a fee-simple would be. (*Atkinson v. Baker*, 2 T. R. 230.) For, an estate *pur autre vie*, (clearly, at all events, when it is limited to a man and his *heirs*,) is in its nature freehold; the devise thereof is not valid unless it be attested by three witnesses, and it can be created and conveyed only by a conveyance proper to create and transfer freehold estate. Lord Redesdale, indeed, doubted whether such an estate could be converted into a chattel interest by any convention of the parties to its creation; and whether a grant to a man, his *executors* and *administrators*, could make the property liable to be acted upon as a chattel interest, except to the extent, and in the cases, for which the statute has specially provided. (*Campbell v. Sandys*, 1 Sch. & Lef. 290.) But Lord Hardwicke appears to have recognized the distinction which may arise out of the terms of limitation, as such terms may direct the devolution of the property, either on the heir or the personal representatives. (*Williams v. Jekyll*, 2 Ves. sen. 684, and see the *Duke of Devonshire v. Atkins*, 2 P. Wms. 382.) However this may be, there is no doubt that an estate *pur autre vie*, limited to *heirs*, is within the statute

[* 260] vise it by will, or it shall go to the executors or administrators, and be assets in their hands for payment of debts; the *other that of 14 Geo. II. c. 20, which enacts, that the surplus of such estate *pur autre vie*, after payment of debts, shall go in a course of distribution like a chattel-interest (3).

The doctrine of common occupancy abolished.

By these two statutes the title of *common occupancy* is utterly extinct and abolished; though that of *special occupancy*, by the heir-at-law, continues to this day; such heir being held to succeed to the ancestor's estate, not by descent, for then he must take an estate of inheritance, but as an occupant specially marked out and appointed by the original grant (4). But, as before the statutes there could no

of fraudulent devises, and liable to *specialty* debts. (*Westfaling v. Westfaling*, 3 Atk. 465.)

An estate *pur autre vie* may be limited by way of *quasi* entail, to the heirs of the body of the tenant as special occupants. But those who have interests in the nature of such an estate-tail, may bar their issue and all remainders over by any alienation during their lives; though not by will. (*Gray v. Mannock*, 2 Eden, 341; *Blake v. Luxton*, Coop. 185; *Blake v. Blake*, 1 Cox, 266; *Campbell v. Sandys*, 1 Sch. & Lef. 296; *ex parte Sterne*, 6 Ves. 158.)

(3) The two statutes referred to in the text, are not cited with precise accuracy. The statute of Cha. II. makes estates *pur autre vie*, in the hands of executors and administrators, assets not merely for payment of debts, but assets generally. And the statute of Geo. II. enacts, that "such estates *pur autre vie* (in case there be no special occupant thereof,) of which no devise shall have been made according to the act for prevention of frauds and perjuries, or so much thereof as shall not have been so devised, shall go, be applied and distributed, in the same manner as the personal estate of the testator or intestate."

Since this note was first published, it has been enacted, by the statute of

3 & 4 Gul. IV. c. 104, that when any person shall die seised of or entitled to any interest or estate in real property, which he has not devised subject to payment of his debts, the same shall be assets to be administered in courts of equity for the payment of the debts of such person: provided that, in such administration, creditors by specialty in which the heirs are bound shall be entitled to priority of payment, before creditors by specialty in which the heirs are not bound, or creditors by simple contract. (See *post*, p. 340, note.)

(4) The doctrine laid down in the text is believed to be sound law, though it has not been uniformly admitted. In *Holden v. Smallbrooke*, (Vaugh. 201,) Chief Justice Vaughan contended that an estate granted to a man and his heirs *pur autre vie*, upon the grantee's death, must be taken by the heir, *not* as special occupant, but as heir; not of a fee, but of a descendible freehold; and *not* by way of limitation, as a purchase to the heir, but by descent. For the consistency of which doctrine with the ancient law, Bracton was cited, who in the 9th chapter of his 2nd book says, "*si fiat donatio, ad vitam donatoris, donatorio et hæredibus suis, si donatorius præmoriatur hæredes ei succedent, tenendum ad vitam donatoris, et*

common occupancy be had of incorporeal hereditaments, as of rents, tithes, advowsons, commons, or the like (*h*), (be-

(*h*) Co. Litt. 41 ; Vaugh. 201.

per assisam mortis antecessoris recuperabunt, qui obiit [seisitus?] ut de feodo." Hence, Vaughan, C. J., argued, that, as the ancestor, in the case supposed, would be deemed to have died seised *as of fee*, though not seised *in fee*; and as the heir would be entitled to the writ of *mortdances-tor*, this amounted to infallible proof that the heir, in such case, takes by descent.

And in the *Anonymous* case in Godbolt, (pl. 238, p. 172,) Walmesley, Warburton, and Foster, JJ. held, that if a rent be granted to one and his heirs for the life of another man, and the grantee dieth, his heir shall *not* be *occupant* of the rent. Warburton held that the heir should have the rent as a freehold descended; and for that he cited 26 Hen. VI. *Statham v. Recognizance*. A distinction, however, was taken, both by Warburton and Walmesley, who said, that although the heir should take by descent, yet it should not be in the nature of a descent of inheritance, (to one purpose, at any rate,) for if he were an infant he should not be allowed his age. (See Co. Litt. 239 a, and the additions to Mr. Christian's note at the foot of the next page.)

In *Low v. Barron*, (3 P. Wms. 262,) it was held that an estate *pur autre vie* to a man and the heirs of his body, is no more than a descendible freehold, (even if that term can be properly applied to it, see *infra*,) and not an estate tail within the statute *de donis*, or such an inheritance as that dower can attach thereon.

If any of the cases above cited are inconsistent with, or go in qualification of the text, still our author's positions are fully supported by several decisions, both ancient and modern.

In the *Anonymous* case in 2 Freem. (pl. 200 b, p. 155,) the tenant of a frank-tenement descendible, had agreed to sell to a purchaser, who paid him part of the purchase money: the vendor died and his heir entered: the vendee exhibited his bill against the heir to have the contract executed. It was resolved by the Lord Keeper Bridgman, assisted by other judges, that the plaintiff could not be relieved; for that the heir was but special occupant, and did not claim under his father, and therefore the covenant or agreement of his father should not oblige him to a conveyance of the land. Some doubt may be entertained as to the soundness of this determination; (see *Stephens v. Bailey*, Nels. 106; *S. C.* cited in 2 Freem. 199; *Pool v. Pool*, 1 Cha. Rep. 18; *S. C.* Tothill, 106;) but it must be considered a very strong intimation of opinion, that an estate *pur autre vie* is not taken by the heir, *qua* heir: for, no rule is better settled than that which says the liability of real, as well as personal representatives, in respect of contracts of the predecessor under whom they claim, is regulated by that of the party himself, looking at the question as it stood at his death. (*Broom v. Monck*, 10 Ves. 607; *Rose v. Conynghame*, 11 Ves. 555; *Buckmaster v. Harrop*, 7 Ves. 344.)

In *Atkinson v. Baker*, (4 T. R. 231,) it was said by Lord Kenyon, that an estate *pur autre vie*, limited to a man, his heirs, executors, and assigns, if not devised, descends to the heir *as* special occupant: thus holding such an estate to have descendible qualities, but not as an estate of inheritance.

In *Ripley v. Waterworth*, (7 Ves. 437,) exceptions were taken to the Master's report, as to certain estates

cause, with respect to them, there could be no actual entry made, or corporal seisin had; and therefore, by the death of the grantee *pur auter vie*, a grant of such hereditaments was entirely determined,) so now, I apprehend, notwithstanding these statutes, such grant would be determined likewise; and the hereditaments would not be devisable, nor vest in the executors, nor go in a course of distribution. For these statutes must not be construed so as to create any new estate, or keep that alive which by the common law was determined, and thereby to defer the grantor's reversion; but merely to dispose of an interest in being, to which by law there was no owner, and which therefore was left open to the first occupant (5). When there is a residue left, the

held on lease, to a man, his executors, administrators, and assigns, for lives; the first exception was, that the Master ought to have certified that the testator had a real or descendible estate and interest of freehold in the said leasehold estates; and that the same belonged to, or descended upon, the heir at law. Lord Eldon said, "it is impossible this exception can be right in stating, that this estate descended upon the heir. I always understood that this was a freehold; but the word *descendible* has been inaptly applied to it; for though the party to take in succession is described as heir, he does not take as such, but as a special occupant named in the grant." This comes fully up to the rule stated in the text.

(5) Mr. Christian, in his note upon this passage, says, "Lord Keeper Harcourt has declared, there is no difference, since the 29 Car. II. c. 3, between a grant of corporeal and incorporeal hereditaments *pur auter vie*; for, by that statute, every estate *pur auter vie* is made devisable, and if not devised, it shall be assets in the hands of the heir, if limited to the heir; if not limited to the heir, it shall go to the executors or administrators of the grantee, and be assets in their hands; and the statute, in the case of rents

and other incorporeal hereditaments, does not enlarge but only preserve the estate of the grantee;" [and as his authority for this statement, Mr. Christian cites 3 P. Wms. 264.]

[If the quotation were strictly accurate, Lord Harcourt must be ranked amongst those who have held that a grant *pur autre vie*, which savours of the realty, may be taken by the grantee's real representative as an *hereditament*. But, Lord Harcourt, in the passage cited, never uses the word "hereditament;" he is speaking, to be sure, of a *rent*, which is always a species of incorporeal property, and may be so limited as to be an hereditament, but Lord Harcourt does not say that a rent granted *pur autre vie*, is an hereditament. His doctrine, therefore, is not at all opposed to that stated at the close of the last note: though it certainly goes to qualify our author's text, which is not penned with Blackstone's usual precision. Even before the statutes, a grant of incorporeal property *pur autre vie* was not necessarily determined by the death of the grantee. Littleton, in his 379th section, and Lord Coke in his commentary thereon, inform us, that before the statutes, if heirs were named in the grant of a rent *pur autre vie*, they would take; and that the

statutes give it to the executors and administrators, instead of the first occupant; but they will not *create* a residue, on purpose to give it to either (*i*). They only meant to provide an appointed instead of a casual, a certain instead of an uncertain, owner of lands which before were nobody's (6); and thereby to supply this *casus omissus*, and render the disposition of law in all respects entirely uniform; this being the only instance wherein a title to a real estate could ever be acquired by occupancy (7).

*This, I say, was the only instance; for I think there can [* 261] be no other case devised, wherein there is not some owner of the land appointed by the law. In the case of a sole corporation, as a parson of a church, when he dies or resigns, though there is no *actual* owner of the land till a successor be appointed, yet there is a *legal, potential* ownership, subsisting in contemplation of law; and when the successor is appointed, his appointment shall have a retrospect and relation backwards, so as to entitle him to all the profits from the instant that the vacancy commenced (8). And, in all other instances, when the tenant dies intestate, and no other owner of the lands is to be found in the common course of descents, there the law vests an ownership in the king, or in the subordinate lord of the fee, by escheat (9).

In cases where there is no heir that can take, the lands vest in the king, or in the lord by escheat.

So also in some cases, where the laws of other nations give As to lands created by the ris-

(*i*) But see now the statute 5 Geo. III. c. 17, which makes leases for one, two, or three lives by *ecclesiastical* persons, or any *eleemosynary* corpo-

ration of tithes or other incorporeal hereditaments, as good and effectual to all intents and purposes as leases of corporeal possessions.

same rule applied to annuities, or any other things, lying in grant, (and see the case from Godbolt, cited in the last note.) Nor is it clear, when heirs were not mentioned, that even before the statutes, executors and administrators, if named in the grant, might not take. There is authority for holding that they might have done so. (See *Westfaling v. Westfaling*, 3 Atk. 466.) And, at all events, the grantee of an estate *pur autre vie*, to himself and his assigns, might, before the statutes, by assigning the estate, have prevented its determination by his death. (*Salter v. Boteler*, Moor, 664; *Crawley's*

case, Dyer, 186 b, in margin.)—ED.]

(6) The amendment of the law in this respect had also another object; it was intended for the relief of creditors. (*Oldham v. Pickering*, 2 Salk. 464; *S. C.* Carthew, 376.)

(7) In the mining districts of Derbyshire and Cornwall, by the laws of the Stannaries, an estate in mines might, and it is believed still may, be gained by occupancy. (*Geary v. Barcroft*, 1 Sid. 347.)

(8) See *ante*, the note to p. 107.

(9) See *ante*, chapter 15, pp. 241—257, with the notes thereto.

ing of islands in
rivers, or by al-
luvion, &c.

a right by occupancy, as in lands newly created, by the rising of an island in the sea or in a river, or by the alluvion or dereliction of the waters; in these instances the law of England assigns them an immediate owner. For Bracton tells us (*k*), that if an island arise in the *middle* of a *river*, it belongs in common to those who have lands on each side thereof; but if it be nearer to one bank than the other, it belongs only to him who is proprietor of the nearest shore: which is agreeable to, and probably copied from, the civil law (*l*). Yet this seems only to be reasonable, where the soil of the river is equally divided between the owners of the opposite shores: for if the whole soil is the freehold of any one man, as it usually is whenever a several fishery is claimed (*m*), there it seems just (and so is the constant practice,) that the eyotts or little islands, arising in any part of the river, shall be the property of him who owneth the piscary and the soil. However, in case a new island rise in the *sea*, though the civil law gives it to the first occupant (*n*), yet ours gives it to the king (*o*). And as to lands gained from the sea, either by *alluvion*, by the washing up of sand and earth, so as in time to make *terra firma*; or by *dereliction*, as when the sea shrinks back below the usual water-mark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining (*p*) (10). For *de minimis non curat lex*:

(*k*) L. 2, c. 2.

(*l*) Inst. 2. 1. 22.

(*m*) Salk. 637; see pag. 39.

(*n*) Inst. 2. 1. 18.

(*o*) Bract. 1. 2, c. 2; Callis of Sewers, 22.

(*p*) 2 Roll. Abr. 170; Dyer, 326.

(10) In the modern case of *The King v. Lord Harborough*, (3 Barn. & Cress. 106; 4 Dowl. & Ryl. 807,) it was decided, that land not suddenly derelict, but formed by alluvion of the sea, imperceptible in its progress, belongs to the owner of the adjoining demesne lands, and not to the crown. It was held, that the intimation thrown out by Lord Hale, in his *Treatise de jure maris*, where he speaks of land gained by alluvion as belonging generally to the crown, "unless the alluvion be so insensible that it cannot by any means be found that the sea was there," was not to be understood as

meaning that the crown would be entitled, if, at the end of a century, or even half a century, the accretion was perceptible by known limits or marks: and that the word "imperceptible," as connected, in the record then before the court, with the words "slow and gradual," was to be taken as expressive only of the manner of the accretion, and as meaning imperceptible *in its progress*, not imperceptible after a long lapse of time.

This decision was confirmed by the House of Lords, on appeal. (See 5 Bingh. 170.)

So, in *Scratton v. Brown*, (5 Barn.

and, besides, these owners, being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss. But, if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king; for, as the king is lord of the sea, and so owner of the soil while it is covered with water (11), it is but reasonable he should have the soil, when the water has left it dry (*q*). So that the quantity of ground gained, and the time during which it is gained, are what make it either the king's or the subject's property. In the same manner, if a river (12), running between two lordships, by degrees gains upon the one, and thereby leaves the other dry, the owner who loses his ground thus imperceptibly has no remedy: but if the course of the river be changed by a sudden and violent flood, or other hasty means, and thereby a man loses his ground, it is said that he shall have what the river has left in any other place, as a recompence for this sudden loss (*r*). And this law of alluvions and derelictions, with regard to *rivers*, is nearly the same in the imperial law (*s*); from whence indeed those our determinations seem to have been drawn and adopted: but we ourselves, as islanders, have applied them to *marine* increases; and have given our sovereign the prerogative he enjoys, as well upon the particular reasons before mentioned, as upon this other general ground of prerogative, which was formerly remarked (*t*), that whatever hath no other owner is vested by law in the king.

(*q*) Callis, 24, 28.

(*r*) Ibid. 28.

(*s*) Inst. 2. l. 20—24.

(*t*) See Vol. I. pag. 298.

& Cress. 505; *S. C.* 6 Dowl. & Ryl. 545,) where a tenement, sea grounds, oyster layings, shores and fisheries, described by certain boundaries, were granted by deed, it was held, that the right of soil in the sea-shore passed to the grantees; and that, as the sea, subsequently to the date of the deed, had imperceptibly and gradually encroached upon the land, that accretion also passed as an incident to that which

belonged to the grantee.

(11) But, the soil, on which the sea ebbs and flows, that is, the soil between the high water mark and low water mark, may be parcel of the manor of a subject. (*Sir Henry Constable's case*, 5 Rep. 107 b; and see *Johnson v. Barrett*, Aleyne, 11.)

(12) Or an arm of the sea. (2 Rolle's Ab. 169, pl. 6.)

CHAPTER XVII.

OF TITLE BY PRESCRIPTION.

Of title by prescription.

A THIRD method of acquiring real property by purchase is that by *prescription* (1); as when a man can shew no other

(1) Bracton (in the 22nd chapter of his 2nd book,) says, "*rerum corporali-um dominia transferentur, sine titulo aut traditione, per usucaptionem, scilicet, per longam, continuam, et pacificam possessionem, ex diuturno tempore. Continuum dico, ita quod non sit interrupta: interrumpi enim poterit multis modis, sine violentiâ adhibitâ, et per talem interruptionem, nunquam acquirat possidens, ex tempore, liberum tenementum. Pacificam dico, quia si contentiosa fuerit, idem erit quod prius, si contentio fuerit justa, et diligenter prosecuta.*" Lord Coke translates, and adopts this account of the qualities and incidents of prescription, in his commentary upon Littleton. (1 Instit. 113.)

In the case of *Potter v. Sir Henry North*, (1 Ventr. 386,) it was said, a prescription that goes to claim a real interest *in solo alieno*, is a title; and as a title must be strictly pleaded; it is not like a prescription by way of discharge, or for an easement. Nothing can be prescribed for, that cannot at this day be raised by grant: for, the law allows prescriptions, only to supply the loss, or supposed loss, of a grant. Upon usage from time to which

the memory of man runneth not to the contrary, the law presumes a grant and a lawful beginning, and allows such usage for a good title; but still, it is but in supply of the loss of a grant: and therefore, for such things as can have no lawful beginning, nor be created at this day by any manner of grant, or reservation, or deed that can be supposed, no prescription is good. (See the next note.)

The Roman law made a difference between *præscriptio*, in its general and extended sense, and that kind of it which they distinguished by the name of *usucapio*. By *usucapio*, they meant the manner of acquiring the property of things, by the effect of time. *Præscriptio* had also the same meaning, but it signified, moreover, the manner of acquiring and losing all sorts of rights and actions, by the same effect of the time regulated by law. (Domat's Civil Law, tit. 7, sect. 4 & 5; Turnbull's note to Heineccius, book 1, ch. 12.) We do not make this difference; *prescription*, with us, is the word applied both to the manner of acquiring the property of things, and to that of acquiring and losing all sorts of rights. The statute of 2 & 3 Gul. IV. c. 71,

title to what he claims, than that he, and those under whom he claims, have immemorially used to enjoy it. Concerning customs, or immemorial usages, in general, with the several requisites and rules to be observed, in order to prove their existence and validity, we inquired at large in the preceding part of these commentaries (*a*). At present therefore I shall only, first, distinguish between *custom*, strictly taken, and *prescription*; and then show what sort of things may be prescribed for.

And, first, the distinction between custom and prescription (2) is this: that custom is properly a *local* usage, and not annexed to any *person*; such as a custom in the manor of Dale that lands shall descend to the youngest son: prescription is merely a *personal* (3) usage; as, that Sempronius and his ancestors, or those whose estate he hath, have used time out of mind to have such an advantage or privilege (*b*). As for example, if there be a usage in the parish of Dale, that all the inhabitants of that parish may dance on a certain close, at all times, for their recreation, (which is held (*c*) to be a lawful usage,) this is strictly a custom, for it is applied to the *place* in general, and not to any particular *persons*: but if the *tenant who is seised of the manor of Dale in fee, alleges that he and his ancestors, or all those whose estate he hath in the said manor, have used time out of mind to have common of pasture in such a close, this is pro-

Distinction between custom and prescription.

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(*a*) See Vol. I. pag. 75, &c.

(*b*) Co. Litt. 113.

(*c*) 1 Lev. 176.

shortened the time of prescription, with respect to claims to rights of common, and (subject to certain specified exceptions,) other profits *a prendre* from the lands of others: and also with respect to claims of rights of way, easements, water-courses, and use of light. The statute of the same session, c. 100, shortened the time required in claims of *modus*, or discharge of tithes.

(2) Custom and prescription, though confounded in common language, are, strictly speaking, very distinct in their nature; (*Baker v. Bearman*, W. Jones, 367;) it is true, that immemorial usage was, in all cases, essential to

them both, before the passing of the acts cited in the last note; but, prescription is not co-existent with general custom; it is derogatory from general custom; and its origin must have been founded on a grant, now evidenced by usage, for which reason, no claim by prescription can be maintained, but such as might have been the subject of a legal grant: (see the last note:) but this rule does not always hold with respect to custom. (*Weekly v. Wildman*, 1 Lord Raym. 407; *Bennett v. Read*, 1 Anstr. 325.)

(3) A body politic or corporate may prescribe. (Co. Litt. 113 b.)

perly called a prescription; for this is a usage annexed to the *person* of the owner of this estate. All prescription must be either in a man and his ancestors, or in a man and those whose estate he hath (*d*): which last is called prescribing in a *que estate*. And formerly a man might, by the common law, have prescribed for a right which had been enjoyed by his ancestors or predecessors at any distance of time, though his or their enjoyment of it had been suspended (*e*) for an indefinite series of years. But, by the statute of limitations, 32 Hen. VIII. c. 2, it is enacted, that no person shall make any prescription by the seisin or possession of his ancestor or predecessor, unless such seisin or possession hath been within threescore years next before such prescription made (*f*) (4).

(*d*) 4 Rep. 32.

(*e*) Co. Litt. 113.

(*f*) This title, of prescription, was well known in the Roman law by the

name of *usucapio*; (Ff. 41. 3. 3;) so called because a man, that gains a title by prescription, may be said *usu rem capere*.

(4) The statute of 21 Jac. I. c. 16, took away the right of entry into lands, after twenty years had elapsed from the time when such right of entry accrued; with a saving in favour of infants, *femes covertes*, lunatics, and persons imprisoned or beyond the seas. By the statute of 1 Mary, sess. 2, c. 5, it was enacted, that the statute of 32 Hen. VIII. c. 2, should not extend to any writ of right of advowson, *quare impedit*, or assize of *darrein presentement* or *jure patronatus*.

The statute of 3 & 4 Gul. IV. c. 27, enacts, that no person shall make an entry or distress, or bring an action or suit in equity to recover any land or rent, but within twenty years after the right accrued to himself or to some person through whom he claims; with provisos in favour of remainder men and reversioners, whose rights are, for the purposes of the act, deemed to have first accrued when their respective estates or interests became estates or interests in possession.

Persons labouring under the disabilities of infancy, coverture, or un-

soundness of mind, are allowed ten years from the removal of those disabilities; and persons claiming through them, ten years from the decease of parties dying under such disabilities, within which they may make entries, or bring actions or suits to recover land or rent; provided that, even in such cases, the remedy is sought within forty years after the right first accrued. Provided also, that no further time than ten years from the death of the person first entitled shall be allowed for a succession of disabilities. Provided moreover, that possession *adverse* to a tenant in tail shall run equally against the remainder-man; and where the tenant in tail has been barred by not seeking his remedy in due time, all other persons shall be concluded whose estates or interests the tenant in tail might lawfully have barred.

In cases of express trust, the right of the *cestui que trust* is to be held, according to the meaning of the act, not to have accrued before the trust estate has been conveyed away by the

Secondly, as to the several species of things which may, or may not, be prescribed for: we may, in the first place, observe, that nothing but incorporeal (5) hereditaments can be claimed by prescription: as a right of way, a common, &c., but that no prescription can give a title to lands, and other corporeal substances, of which more certain evidence may be had (*g*). For a man shall not be said to prescribe, that he and his ancestors have immemorially used to hold the castle of Arundel: for this is clearly another sort of title; a title by corporal seisin and inheritance, which is more permanent, and therefore more capable of proof, than that of prescription. But, as to a right of way, a common, or the like, a man may be allowed to prescribe: for of these there is no corporal seisin, the enjoyment will be frequently by intervals, and therefore the right to enjoy them can depend on nothing else but immemorial usage. 2. A prescription must always be * laid in him that is tenant of the fee. A tenant for

Incorporeal hereditaments alone can be claimed by prescription.

Prescription must always be laid in the tenant of the fee.

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(*g*) Dr. & St. Dial. 1, c. 8; Finch, 132.

trustee to a purchaser for valuable consideration, and in cases of concealed fraud, the right of persons defrauded to bring a suit in equity for the recovery of land or rent, shall not be deemed to have first accrued, until the time when the fraud was, or with reasonable diligence might have been discovered.

Mortgagors are to be barred by twenty years' possession of the mortgaged premises by the mortgagee, or by his receipt of the rents thereof for that length of time; unless he has within that period given a written acknowledgment of the mortgagor's right of redemption.

No lands or rents are to be recovered by ecclesiastical or eleemosynary corporations sole, but within two incumencies and six years after the appointment of a third, if these terms, together, make up the period of sixty years; if not, the right is not to be barred until the sixty years are completed.

No right of advowson is to be re-

covered, by any form of action or suit, after 100 years adverse possession.

At the end of the several periods of limitation fixed by this act, not only are the remedies taken away, but the rights absolutely extinguished.

By the same act, all real and mixed actions are abolished, except writs of dower, *quare impedit*, or ejectment.

(5) This is inapparent contradiction to the *old* law, as laid down by Bracton, and stated in the first note to this chapter. And it is true, that later legal writers do, like our author, only admit prescription to operate in the case of incorporeal hereditaments. But, there is a kind of negative prescription established by the statute law, extending to corporeal hereditaments, by which an uninterrupted possession for a certain number of years, will give the possessor a substantially good title, by taking from all other persons the right of entering on such hereditaments, or of maintaining any action, or suit, for them. (See the last note and pp. 196, 199.)

life, for years, at will, or a copyholder, cannot prescribe, by reason of the imbecility of their estates (*h*). For, as prescription is usage beyond time of memory (6), it is absurd that they should pretend to prescribe for any thing, whose estates commenced within the remembrance of man. And therefore the copyholder must prescribe under cover of his lord's estate (7), and the tenant for life, under cover of the tenant in fee-simple. As if tenant for life of a manor would prescribe for a right of common as appurtenant to the same, he must prescribe under cover of the tenant in fee-simple; and must plead that John Stiles and his ancestors had immemorially used to have this right of common, appurtenant to the said manor, and that John Stiles demised the said manor, with its appurtenances, to him the said tenant for life.

It cannot be for a thing not lying in grant; for it presupposes the existence of a grant.

That which arises by matter of record cannot be prescribed for, but must be claimed by grant.

3. A prescription cannot be for a thing which cannot be raised by grant. For the law allows prescription only in supply of the loss of a grant, and therefore every prescription presupposes a grant to have existed (8). Thus, the lord of a manor cannot prescribe to raise a tax or toll upon strangers; for, as such claim could never have been good by any grant, it shall not be good by prescription (*i*). 4. A fourth rule is, that what is to arise by matter of record cannot be prescribed for, but must be claimed by grant, entered on record (9); such as, for instance, the royal franchises of

(*h*) 4 Rep. 31, 32.

(*i*) 1 Ventr. 387.

(6) See the preceding notes to this chapter, where recent statutes are cited, by which the time of prescription is shortened.

(7) If a copyholder, as such, claims right of common, or other profit, in the soil of a stranger, he ought, as stated in the text, to prescribe in the name of the lord of the manor; but if the copyholder claims common, or other profit, in the lord's soil, then of course he cannot prescribe against the lord, in the lord's name; and as the nature of his estate prevents him from prescribing in his own name, he is, from necessity, allowed, in his pleading to allege his claim to be dependent on *custom*, though *prescription* would,

under other circumstances, be the correct allegation. (*Foiston v. Cracherode*, 4 Rep. 31 b; *Gateward's case*, 6 Rep. 61 a; *Day v. Savage*, Hob. 86; *Roberts v. Young*, Hob. 286; *Pearce v. Bacon*, Cro. Eliz. 390.)

(8) See note (1) to this chapter, as also p. 37, note. And it should seem, that if a grant, though made before time of legal memory, appears as if it was by matter of record; the thing granted must be claimed by force of the grant, not by prescription. (*Keilway*, 123 b, pl. 78.) See the next note.

(9) For, prescription being but an usage *in pais*, can never extend to such things as cannot be seised or had with-

deodands, felons' goods, and the like. These, not being forfeited till the matter on which they arise is found by the inquisition of a jury, and so made a matter of record, the forfeiture itself cannot be claimed by any inferior title. But the franchises of treasure-trove, waifs, estrays, and the like, may be claimed by prescription (10); for they arise from private contingencies, and not from any matter of record (*k*). 5. As to the manner of prescribing. Among things incorporeal, which may be claimed by prescription, a distinction must be made with regard to the manner of prescribing; that is, whether a man shall prescribe in a *que estate*, or in himself and his ancestors. For, if a man prescribes in a *que estate*, (that is, in himself and those whose estate he holds,) nothing * is claimable by this [* 266] prescription, but such things as are incident, appendant, or appurtenant to lands; for it would be absurd to claim any thing as the consequence, or appendix of an estate, with which the thing claimed has no connexion: but, if he prescribes in himself and his ancestors, he may prescribe for any thing whatsoever that lies in grant; not only things that are appurtenant (11), but also such as may be in gross (*l*). Therefore a man may prescribe, that he, and those whose estate he hath in the manor of Dale, have used to hold the advowson of Dale, as *appendant* to that manor; but, if the advowson be a distinct inheritance, and not appendant, then he can only prescribe in his ancestors. So also a man may prescribe in a *que estate* for a common *appurtenant* to a manor; but, if he would prescribe for a common *in gross*, he must prescribe in himself and his ancestors. 6. Lastly, we may observe, that estates gained by prescription are not, of course, descendible to the heirs general, like other purchased estates, but are an exception to the rule. For, properly speaking, the prescription is rather to be considered as an evidence of a former acquisition, than as an acquisition *de novo* (12): and therefore, if

(*k*) Co. Litt. 114.

(*l*) Litt. s. 183; Finch, L. 104.

out matter of record. (*Foxley's case*, 5 Rep. 110 a; *Case of the Abbot of Strata Marcella*, 9 Rep. 25 b.)

(10) See the 3rd chapter of this volume, sect. 3, p. 37.

(11) But, if the grant appear, the thing granted cannot be claimed as appendant. (Keilway, 123 b.)

(12) This seems to show that our author is hardly accurate in speak-

a man prescribes for a right of way in himself and his ancestors, it will descend only to the blood of that line of ancestors in whom he so prescribes; the prescription in this case being indeed a species of descent. But, if he prescribes for it in a *que estate*, it will follow the nature of that estate in which the prescription is laid, and be inheritable in the same manner, whether that were acquired by descent or purchase; for every accessory followeth the nature of its principal.

ing of prescription at the commence- of acquiring real property by pur-
ment of this chapter, as a method chase.

CHAPTER XVIII.

OF TITLE BY FORFEITURE.

FORFEITURE is a punishment annexed by law to some illegal Forfeiture.
act, or negligence, in the owner of lands, tenements, or
hereditaments: whereby he loses all his interest therein,
and they go to the party injured, as a recompence for the
wrong which either he alone, or the public together with
himself, hath sustained.

Lands, tenements, and hereditaments, may be forfeited The various de-
grees and means
of forfeiture.
in various degrees and by various means: 1. By crimes and
misdemesnors. 2. By alienation contrary to law. 3. By
non-presentation to a benefice, when the forfeiture is de-
nominated a *lapse*. 4. By simony. 5. By non-performance
of conditions. 6. By waste. 7. By breach of copyhold cus-
toms. 8. By bankruptcy.

I. The foundation and justice of forfeitures for *crimes and* I. By crimes and
misdemeanors.
misdemesnors, and the several degrees of those forfeitures
proportioned to the several offences, have been hinted at in
the preceding volume (a); but will be more properly con-
sidered, and more at large, in the fourth book of these com-
mentaries. At present I shall only observe in general, that
the offences which induce a forfeiture of lands (1) and tene-
ments to the crown are principally the following six: 1.
Treason. 2. Felony (2). 3. Misprision of treason. 4. *Præ-*

(a) Vol. I. pag. 299.

(1) See *ante*, pp. 251—256, and the
notes thereto.

(2) By the statute of 54 Geo. III.
c. 145, it is enacted, that no attainder
for felony, save and except in cases of
the crime of high treason, or of the

crimes of petit treason, or murder, or
of abetting, procuring, or counselling
the same, shall extend to the disin-
heriting of any heir, nor to the preju-
dice of the right or title of any person
or persons, other than the right or

munire. 5. Drawing a weapon on a judge, or striking any one in the presence of the king's principal courts of justice. 6. Popish recusancy, or non-observance of certain laws enacted in restraint of papists (3). But at what time they severally commence, how far they extend, and how long they endure, will with greater propriety be reserved as the object of our future inquiries.

II. By alienation.

II. Lands and tenements may be forfeited by *alienation*, or conveying them to another, contrary to law. This is either alienation in *mortmain*, alienation to an *alien*, or alienation by *particular tenants*: in the two former of which cases the forfeiture arises from the incapacity of the alienee to take, in the latter from the incapacity of the alienor to grant.

1. Alienation in mortmain.

1. Alienation in *mortmain*, in *mortua manu*, is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal. But these purchases having been chiefly made by religious houses (4), in consequence whereof the lands became perpetually inherent in one dead hand, this hath occasioned the general appellation of mortmain to be applied to such alienations (*b*), and the religious houses themselves to be principally considered in forming the statutes of mortmain: in deducing the history of which statutes, it will be matter of curiosity to observe the great address and subtile contrivance of the ecclesiastics in eluding from time to time the laws in being, and the zeal with which successive parliaments have pursued them through all their finesses: how new remedies were still the parents of new evasions; till the legislature at last, though with difficulty, hath obtained a decisive victory.

To enable them to purchase

By the common law any man might dispose of his lands

(*b*) See Vol. I. pag. 479.

title of the offender or offenders, during his, her, or their natural lives only; and that it shall be lawful to every person or persons, to whom the right or interest of any lands, tenements, or hereditaments, after the death of any such offender or offenders, should or might have appertained, if no such attainder had been, to enter into the same. And since this note was first

published, the statute of 3 & 4 Gul. IV. c. 106, s. 10, has enacted, that after the death of *any* person attainted, (without exception,) his descendants may inherit.

(3) The liberality, or rather the justice, of modern times, has abolished this ground of forfeiture.

(4) See Vol. IV. p. 108.

to any other private man at his own discretion, especially when the feudal restraints of alienation were worn away. Yet, in consequence of these it was always, and is still necessary (c), for corporations to have a licence in mortmain *from the crown, to enable them to purchase lands; for as the king is the ultimate lord of every fee, he ought not, unless by his own consent, to lose his privilege of escheats and other feudal profits (5), by the vesting of lands in tenants that can never be attainted or die. And such licences of mortmain seem to have been necessary among the Saxons, above sixty years before the Norman conquest (d). But, besides this general licence from the king, as lord paramount of the kingdom, it was also requisite, whenever there was a mesne or intermediate lord between the king and the alienor, to obtain his licence also, (upon the same feudal principles,) for the alienation of the specific land. And if no such licence was obtained, the king or other lord might respectively enter on the land so aliened in mortmain as a forfeiture. The necessity of this licence from the crown was acknowledged by the constitutions of Clarendon (e), in respect of advowsons, which the monks always greatly coveted, as being the groundwork of subsequent appropriations (f). Yet, such were the influence and ingenuity of the clergy, that (notwithstanding this fundamental principle) we find that the largest and most considerable dotations of religious houses happened within less than two centuries after the conquest. And, (when a licence could not be obtained,) their contrivance seems to have been this: that, as the forfeiture for such alienations accrued in the first place to the immediate lord of the fee, the tenant who meant to alienate first conveyed his lands to the religious house, and instantly took them back again, to hold as tenant to the monastery; which kind of instantaneous seisin was probably held not to occasion any forfeiture: and then, by pretext of some other forfeiture, surrender or escheat, the society entered into those

lands, corporations obtained licences of mortmain from the crown.

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Evasion of this rule by the clergy:

(c) F. N. B. 121.

assensu et consensione ipsius. C. 2, A.

(d) Selden, Jan. Angl. l. 2, s. 45.

D. 1164.

(e) *Ecclesiæ de feudo domini regis non possunt in perpetuum dari, absque*

(f) See Vol. I. p. 384.

(5) See the 5th chapter of this volume, pp. 59 and 72.

[* 270]

to prevent which, conveyances to religious houses were made void, and the land forfeited.

This ordinance being also evaded, produced the statute *de religiosis*, 7 Ed. I.

lands in right of such their newly-acquired signiory, as immediate lords of the fee. But, when these dotations began to grow numerous, it was observed that the feudal services, ordained for the defence of the kingdom, were every day visibly withdrawn; that the circulation of landed property from man to man began to *stagnate; and that the lords were curtailed of the fruits of their signiories, their escheats, wardships, reliefs, and the like; and therefore, in order to prevent this, it was ordained by the second of king Henry III.'s great charters (*g*), and afterwards by that printed in our common statute-books, that all such attempts should be void, and the land forfeited to the lord of the fee (*h*).

But, as this prohibition extended only to religious *houses*, bishops and other sole corporations were not included therein; and the aggregate ecclesiastical bodies, (who, Sir Edward Coke observes (*i*), in this were to be commended, that they ever had of their counsel the best learned men that they could get,) found many means to creep out of this statute, by buying in lands that were *bonâ fide* holden of themselves as lords of the fee, and thereby evading the forfeiture; or by taking long leases for years, which first introduced those extensive terms, for a thousand or more years, which are now so frequent in conveyances. This produced the statute *de religiosis*, 7 Edw. I.; which provided that *no person*, religious or other whatsoever (*6*), should buy, or sell, or receive under pretence of a gift, or term of years, or any other title whatsoever, nor should, by any art or ingenuity, appropriate to himself, any lands or tenements in mortmain:

(*g*) A. D. 1217. cap. 43. edit. Oxon.

(*h*) *Non licet alicui de cætero dare terram suam alicui domui religiosæ, ita quod illam resumat tenendam de eadem domo; nec liceat alicui domui religiosæ terram alicujus sic accipere, quod tradat illam ei a quo ipsam rece-*

pit tenendam: si quis autem de cætero terram suam domui religiosæ sic dederit, et super hoc convincatur, donum suum penitus cassetur, et terra illa domino suo illius feodi incurratur. Mag. Cart. 9 Hen. III. c. 36.

(*i*) 2 Inst. 75.

(6) These words, according to ordinary construction, seem sufficient to include all corporations, sole, aggregate, ecclesiastical, or temporal; and so Lord Coke understood them. (1 Inst. 2 b.) But, notwithstanding the extensive terms of the statute of Edw. I., it may be inferred from the statute

of 15 Rich. II. c. 5, that until the passing of the last named act, guilds and fraternities, as well as mayors, bailiffs, and commons of towns having a perpetual commonalty, and others having offices perpetual, were not considered within the restrictions of mortmain.

upon pain that the immediate lord of the fee, or, on his default for one year, the lords paramount, and in default of all of them, the king, might enter thereon as a forfeiture.

This seemed to be a sufficient security against all alienations in mortmain: but as these statutes extended only to gifts and conveyances between the parties, the religious houses now began to set up a fictitious title to the land, which it was intended they should have, and to bring an *action to recover it against the tenant; who, by fraud and collusion, made no defence; and thereby judgment was given for the religious house, which then *recovered* the land by sentence of law upon a supposed prior title. And thus they had the honour of inventing those fictitious adjudications of right, which are since become the great assurance of the kingdom, under the name of *common recoveries* (7). But upon this the statute of Westminster the second, 13 Edw. I. c. 32, enacted, that in such cases a jury shall try the true right of the demandants or plaintiffs to the land, and if the religious house or corporation be found to have it, they shall still recover seisin; otherwise it shall be forfeited to the immediate lord of the fee, or else to the next lord, and finally to the king, upon the immediate or other lord's default. And the like provision was made by the succeeding chapter (k), in case the tenants set up crosses upon their lands (the badges of knights templars and hospitallers) in order to protect them from the feudal demands of their lords, by virtue of the privileges of those religious and military orders. So careful indeed was this provident prince to prevent any future evasions, that when the statute of *quia emptores*, 18 Edw. I., abolished all sub-infeudations, and gave liberty for all men to alienate their lands to be holden of their next immediate lord (l), a proviso was inserted (m) that this should not extend to authorise any kind of alienation in mortmain. And when afterwards the method of obtaining the king's licence by writ of *ad quod damnum* was marked out (8), by the statute 27 Edw. I. st. 2, it was

Origin of common recoveries.

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The statute of Westminster 2nd.

(k) Cap. 33.

(l) 2 Inst. 501.

(m) Cap. 3.

(7) See *post*, chapter 21, sect. 4, p. 357, and the appendix to this volume, No. 5.

common recoveries have been abolished by the statute of 3 & 4 Gul. IV. c. 74.

Since this note was first published,

(8) It is, perhaps, not quite accu-

farther provided by statute 34 Edw. I. st. 3, that no such licence should be effectual, without the consent of the mesne or intermediate lords.

New method of conveyance devised by the clergy to nominal feoffees to the use of the religious houses.

[* 272]

But the statute 15 Ric. II. c. 5, made *uses* subject to the statutes of mortmain.

Yet still it was found difficult to set bounds to ecclesiastical ingenuity; for when they were driven out of all their former holds, they devised a new method of conveyance, by which the lands were granted, not to themselves directly, but to nominal feoffees *to the use of* the religious houses; thus distinguishing between the *possession* and the *use*, and receiving *the actual profits, while the seisin of the lands remained in the nominal feoffee; who was held by the courts of equity (then under the direction of the clergy) to be bound in conscience to account to his *cestuy que use* for the rents and emoluments of the estate. And it is to these inventions that our practisers are indebted for the introduction of uses and trusts, the foundation of modern conveyancing. But, unfortunately for the inventors themselves, they did not long enjoy the advantage of their new device; for the statute 15 Ric. II. c. 5, enacts, that the lands which had been so purchased to uses should be amortised by licence from the crown, or else be sold to private persons; and that, for the future, uses shall be subject to the statutes of mortmain, and forfeitable like the lands themselves. And whereas the statutes had been eluded by purchasing large tracts of land, adjoining to churches, and consecrating them by the name of church-yards, such subtile imagination is also declared to be within the compass of the statutes of mortmain. And civil or lay corporations, as well as ecclesiastical, are also declared to be within the mischief, and of course within the remedy provided by those salutary laws. And, lastly, as during the times of popery lands were frequently given to superstitious uses, though not to any corporate bodies; or were made liable in

rate to say, that the statute 27 Edw. I. *marked out* the proceeding noticed in the text; for, it is therein mentioned as a thing "accustomed." And see the stat. of 20 Edw. I., entitled *statutum de brevi de inquisitionibus concedendis de terris ad manum mortuam ponendis*, (which is printed among the "statutes uncertain in their times,")

where the writ in question is spoken of as an usual one: though the statute just named enacted, that such writ should not, thenceforward, be granted, unless upon petition presented in full parliament. This last provision, however, is abrogated by the act of 7 & 8 Will. III. c. 3, stated *post*, in page 273.

the hands of heirs and devisees to the charge of obits, chaunteries, and the like, which were equally pernicious in a well-governed state as actual alienations in mortmain; therefore, at the dawn of the reformation, the statute 23 Hen. VIII. c. 10, declares, that all future grants of lands for any of the purposes aforesaid, if granted for any longer term than twenty years, shall be void.

But, during all this time, it was in the power of the crown, by granting a licence of mortmain, to remit the forfeiture, so far as related to its own rights; and to enable any spiritual or other corporation to purchase and hold any lands or tenements in perpetuity; which prerogative is declared and confirmed by the statute 18 Edw. III. st. 3, c. 3. But, as doubts were conceived at the time of the revolution how far such licence was valid (*n*), since the king had no *power to dispense with the statutes of mortmain by a clause of *non obstante*(*o*), which was the usual course, though it seems to have been unnecessary(*p*): and as, by the gradual declension of mesne signiories through the long operation of the statute of *quia emptores*, the rights of intermediate lords were reduced to a very small compass; it was therefore provided by the statute 7 & 8 W. III. c. 37, that the crown for the future at its own discretion may grant licences to aliene or take in mortmain, of whomsoever the tenements may be holden(9).

The Crown may still grant licences to aliene or take lands, &c. in mortmain.

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After the dissolution of monasteries under Henry VIII. though the policy of the next popish successor affected to grant a security to the possessors of abbey lands, yet, in order to regain so much of them as either the zeal or timidity of their owners might induce them to part with, the statutes of mortmain were suspended for twenty years by the statute 1 & 2 P. & M. c. 8, and during that time, any lands or tenements were allowed to be granted to any spiritual corporation without any licence whatsoever. And, long afterwards, for a much better purpose, the augmentation of poor livings, it was enacted by the statute 17 Car. II. c. 3, that appropriators may annex the great tithes to the vicarages; and that all benefices under 100*l.* *per annum*

By 1 & 2 P. & M. c. 8, the statutes of mortmain were suspended for twenty years.

Enactments for the augmentation of poor livings.

(*n*) 2 Hawk. P. C. 391. (*o*) Stat. 1 W. & M. st. 2, c. 2. (*p*) Co. Litt. 99.

(9) See the last note.

Queen Anne's
bounty.

Charitable uses.

may be augmented by the purchase of lands without licence of mortmain in either case; and the like provision hath been since made, in favour of the governors of Queen Anne's bounty (*q*). It hath also been held (*r*), that the statute 23 Hen. VIII. before mentioned did not extend to any thing but *superstitious* uses; and that therefore a man may give lands for the maintenance of a school, an hospital, or any other *charitable* uses. But as it was apprehended, from recent experience, that persons on their death-beds might make large and improvident dispositions even for these good purposes, and defeat the political ends of the statutes of mortmain; it is therefore enacted by the statute 9 Geo. II. c. 36, that no lands or tenements, or money to be laid out thereon, shall be given for or charged with any *charitable* uses whatsoever, unless by deed indented, executed in the presence of two witnesses, twelve calendar months before the death of the donor, and enrolled in the Court of Chancery within six months after its execution, (except stocks in the public funds, which may be transferred within six months previous to the donor's death,) and unless such gift be made to take effect immediately, and be without power of revocation: and that all other gifts shall be void (10). The two

(*q*) Stat. 2 & 3 Ann. c. 11.

(*r*) 1 Rep. 24.

(10) A bequest of money, to be employed in building upon, or otherwise improving, land already in mortmain, is not considered a violation of the statute. (*Attorney General v. Parsons*, 8 Ves. 191; *Attorney General v. Munby*, 1 Meriv. 345; *Corbyn v. French*, 4 Ves. 428.) And where a testator has pointed out such a mode of applying his bequest, in favour of a charity, as the policy of the law will not admit, still, if he has left it entirely optional to his executors, or trustees, to adopt that mode, or to select some other not liable to the same objections, the bequest may be legally carried into effect. (*Grimmet v. Grimmet*, Ambl. 212; *S. C.* 1 Dick. 251; *Kirkbank v. Hudson*, 7 Price, 217; *Curtis v. Hutton*, 14 Ves. 539; *Attorney General v. Goddard*, 1 Turn. & Russ. 350.) But,

where the testator has used words of request, or recommendation, (not expressly leaving the matter to the discretion of his executors,) those words of request are held to be mandatory. (*Taylor v. George*, 2 Ves. & Bea. 378; *Paul v. Compton*, 8 Ves. 380; *Parsons v. Baker*, 18 Ves. 476.) And if they point to an appropriation of the legacy contrary to the policy of the law, the legacy must fail. (*Grieves v. Case*, 1 Ves. jun. 550.)

In the *Attorney General v. Davies*, (9 Ves. 543,) it was justly termed an absurd distinction, to say that a testator shall not give land to a charity, yet that he may give money conditionally, in consideration of another's giving land for a charity. And it is now perfectly well settled, notwithstanding some earlier decisions of Lord Hard-

universities, their colleges, and the scholars upon the foundation of the colleges of Eton, Winchester, and Westmin-

wicke to the contrary, that if a testator give personal property "to erect and endow" a school, or hospital, it must be considered, unless it be otherwise declared in his will, that it was the testator's intention land should be acquired, as a necessary part of his purpose: (*Chapman v. Brown*, 6 Ves. 408; *Attorney General v. Davies*, 9 Ves. 544;) but where the testator has expressly directed that no part of the money bequeathed shall be employed in the purchase of land, it being his expectation that other persons will, at their expense, purchase lands and buildings for the purposes intended, there the statute has been held not to apply. (*Henshaw v. Atkinson*, 3 Mad. 313.) So, where a testator's directions can be sufficiently answered by hiring land or buildings for the purposes of a charity, the bequest may be sustained: (*Attorney General v. Parsons*, 8 Ves. 191; *Johnson v. Swan*, 3 Mad. 467;) but, it seems, such hiring must not be on lease, or it would be an acquisition, by the testator's direction, of such an interest in lands, tenements, or hereditaments, as the third section of the statute prohibits. (*Blandford v. Thackerell*, 2 Ves. jun. 241.) And where a testator has directed that his real and personal estate shall be employed by the trustees named in his will, in the purchase of land and the erection of a school-house thereon, and the subsequent endowment and support of the school so to be erected; the illegality of this gift cannot be cured by an offer, on the part of the trustees or others, to provide at their own expense the land required. (*Attorney General v. Nash*, 3 Brown, 588, 595.)

Charitable legacies, secured by mortgages on lands, (*Currie v. Pye*, 17 Ves. 464; *Attorney General v. Mey-*

rick, 2 Ves. sen. 46,) or on turnpike tolls, (*Corbyn v. French*, 4 Ves. 380; *Howse v. Chapman*, 4 Ves. 545,) or by an assignment of poor rates, or county rates, (*Finch v. Squire*, 10 Ves. 44; *The King v. Bates*, 3 Price, 358,) are all void; as is a bequest of navigation shares to charitable uses; (*Buck-eridge v. Ingram*, 2 Ves. jun. 663;) for in each of these cases it has been held, that the donation not only savours of the realty, but partakes of it; that a real interest arising out of the soil, (though not the soil itself,) is attempted to be given; and that this attempt, being in fraud of the statute, cannot be carried into effect.

A bequest to a charity being void so far as it touches any interest in land, it follows, upon principle, and, after some fluctuation, (*Attorney General v. Graves*, Ambl. 158,) is now confirmed by repeated decisions, that where a testator has charged his real estate, in aid of his personal, with payment of all his legacies, there, if the personal estate be not sufficient for payment of the whole, charitable legacies must abate, and receive such average proportion only as the personal assets afford for the discharge of the whole pecuniary legacies. If a court of equity were to marshal the assets, and secure full payment of the charitable legacies, by throwing the other pecuniary legacies upon the testator's real estate, it would be enabling that to be done circuitously which cannot be done directly. (*Attorney General v. Tyndall*, 2 Eden, 210; *Waller v. Childs*, Ambl. 526; *Foster v. Blagden*, Ambl. 704; *Ridges v. Morrison*, 1 Cox, 181.)

As the object of the statute of mortmain was wholly political, as it grew out of local circumstances, and was meant to have merely a local opera-

ster, are excepted out of this act: but such exemption was granted with this proviso, that no college shall be at liberty to purchase more advowsons than are equal in number to one moiety of the fellows or students⁽¹¹⁾ upon the respective foundations.

tion, it is decided that its provisions do not extend to the alienation of land in the West India colonies; (*Attorney General v. Stewart*, 2 Meriv. 161;) or in Scotland. (*Mackintosh v. Townsend*, 16 Ves. 338.) But, a devise of real estate situate in England, for charitable purposes, will not be the less void because such purposes are to be carried into execution out of England. (*Curtis v. Hutton*, 14 Ves. 541.)

It has been said, that if an heir-at-law will confirm his ancestor's devise of land to a charity, no court will take it away; for the gift becomes the act and deed of the heir: (*Attorney General v. Graves*, Ambl. 158; and see *Pickering v. Lord Stamford*, 2 Ves. jun. 584;) however, as an immediate gift from the heir would be good only in case it was made a year before his death; upon the principle of the statute, he ought to live a year after confirmation of the devise to give it validity.

When a bequest for charitable purposes, which, if it stood alone, would be valid, is coupled with and dependent upon a devise void under the statute of mortmain, the devise being the principal, and failing, the accessory bequest must also fail. (*Attorney General v. Davies*, 9 Ves. 543; *Chapman v. Brown*, 6 Ves. 410; *Attorney General v. Goulding*, 2 Brown, 429.) And where an undefined portion of a legacy is directed by the testator to be applied for purposes which the policy of the law does not admit, the bequest of the residue to a charity which the law sanctions, cannot take effect; for, the illegal part of the gift being undefined, it is impossible to ascertain the

amount of the residue. (*Attorney General v. Hinxman*, 2 Jac. & Walk. 277; *Vezev v. Jamson*, 1 Sim. & Stu. 71; *Grieves v. Case*, 1 Ves. jun. 553.) If, indeed, the legal bequest and the illegal purpose are not so connected as to be inseparable, and the proportions are defined, or capable of being exactly calculated, in such cases the bequest may be supported. (*Attorney General v. Stepney*, 10 Ves. 29; *Waite v. Webb*, 6 Mad. 71.)

Where a bequest of money to be laid out in land is void under the Mortmain Act, the money never becomes impressed with the character of land, and no resulting trust arises in favour of the testator's heir-at-law. (*Attorney General v. Tonner*, 2 Ves. jun. 7; *Chapman v. Brown*, 6 Ves. 411.)

By the statute of 43 Geo. III. c. 137, the operation of the Mortmain Act is so far qualified as to allow any one to give, by deed enrolled, or by will, any real or personal property for the augmentation of Queen Anne's bounty.

And by statute 43 Geo. III. c. 108, persons are allowed to give, by deed, or will, lands not exceeding five acres, or goods and chattels not exceeding 500*l.*, for the purposes of promoting the building or repairing of churches, or of houses for the residence of ministers, and of providing churchyards, or (with certain restrictions) glebes. If such gift exceed the prescribed limits, it is not therefore void, the lord chancellor may reduce it.¹

The greater part of this note is extracted from 2 Hovenden on Frauds, 308—312.

(11) By the 45 Geo. III. c. 101, this part of the statute is repealed, so

2. Secondly, alienation *to an alien* is also a cause of forfeiture to the crown of the land so alienated: not only on account of his incapacity to hold them (12), which occasions him to be passed by in descents of land (s), but likewise on account of his presumption in attempting, by an act of his own, to acquire any real property; as was observed in the preceding volume (t).

2. Alienation to an alien is a cause of forfeiture.

3. Lastly, alienations *by particular tenants*, when they are greater than the law entitles them to make, and divest the remainder or reversion (u) (13), are also forfeitures to him whose right is attacked thereby. As, if tenant for his own life alienes by feoffment or fine for the life of another, or in tail, or in fee; these being estates, which either must or may last longer than his own, the creating them is not only beyond his power, and inconsistent with the nature of his interest, but is also a forfeiture of his own particular estate to him in remainder or reversion (v). For which there seem to be two reasons: First, because such alienation amounts to a renunciation of the feudal connexion and dependence; it implies a refusal to perform the due renders and services to the lord of the fee, of which fealty is constantly one; and it tends in its consequence to defeat and divest the remainder or reversion expectant: as therefore that is put in jeopardy by such act of the particular tenant, it is but just, that, upon discovery, the particular estate should be forfeited and taken from him, who has shewn so manifest an inclination to make an improper use of it. The other reason is, because the particular tenant, by granting a larger estate than his own, has by his own act determined and put an entire end to his own original interest; and on such determination the next taker is entitled to enter regularly, as in his remainder or reversion. The same law which is thus laid down with regard to tenants for life, holds also with respect to all tenants of the mere freehold or of chattel interests; but if tenant in tail alienes (14) in fee, this

3. Alienation by particular tenants, granting estates larger than their own.

[* 275]

(s) See pag. 249, 250.

(u) Co. Litt. 251.

(t) Book i. pag. 372.

(v) Litt. s. 415.

that these colleges may now hold any number of advowsons.—CH.

(12) See *ante*, p. 131.

(13) See *ante*, pp. 153, 171, and

the note to the last cited page.

(14) The alienation must be by feoffment, or by matter of record, otherwise it will not even work a dis-

is no immediate forfeiture to the remainder-man, but a mere *discontinuance* (as it is called (*w*)) of the estate tail, which the issue may afterwards avoid by due course of law (*x*): for he in remainder or reversion hath only a very remote and barely possible interest therein, until the issue in tail is extinct. But, in case of such forfeitures by particular tenants, all legal estates by them before created, as, if tenant for twenty years grants a lease for fifteen, and all charges by him lawfully made on the lands, shall be good and available in law (*y*). For the law will not hurt an innocent lessee for the fault of his lessor; nor permit the lessor, after he has granted a good and lawful estate, by his own act, to avoid it, and defeat the interest which he himself has created.

Disclaimer of
tenure a for-
feiture.

Equivalent, both in its nature and its consequences, to an illegal alienation by the particular tenant, is the civil crime of *disclaimer*; as, where a tenant who holds of any lord, neglects to render him the due services, and, upon an action brought to recover them, disclaims to hold of his lord. Which disclaimer of tenure in any court of record is a forfeiture of the lands to the lord (*z*), upon reasons most apparently feudal. And so likewise, if in any court of record the *particular tenant does any act which amounts to a virtual disclaimer; if he claims any greater estate than was granted him at the first infeodation, or takes upon himself those rights which belong only to tenants of a superior class (*a*); if he affirms the reversion to be in a stranger, by accepting his fine, attorning as his tenant, collusive pleading, and the like (*b*); such behaviour amounts to a forfeiture of his particular estate.

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III. By lapse—
a forfeiture oc-
casioned by the
neglect of the
patron to pre-
sent to a vacant
church.

III. Lapse (15) is a species of forfeiture, whereby the right of presentation to a church accrues to the ordinary by neglect of the patron to present, to the metropolitan by neglect of the ordinary, and to the king by neglect of the metropolitan. For, it being for the interest of religion, and the good of the public, that the church should be provided with an officiating

(*w*) See book iii. c. 10.

(*z*) Finch, 270, 271.

(*x*) Litt. s. 595—597.

(*a*) Co. Litt. 252.

(*y*) Co. Litt. 233.

(*b*) Ibid. 253.

continuance of the estate-tail. (Litt.
sections 606—611.)

(15) See *ante*, the notes to pp. 22,
23, and Vol. III. p. 246.

minister, the law has therefore given this right of lapse, in order to quicken the patron, who might otherwise, by suffering the church to remain vacant, avoid paying his ecclesiastical dues, and frustrate the pious intentions of his ancestors. This right of lapse was first established about the time (though not by the authority (c)) of the council of Lateran (d), which was in the reign of our Henry the second, when the bishops first began to exercise universally the right of institution to churches (e). And therefore, where there is no right of institution, there is no right of lapse: so that no (16) *donative* can lapse to the ordinary (f), unless it hath been augmented by the Queen's bounty (g). But no right of lapse can accrue, when the original presentation is in the crown (h) (17).

The term, in which the title to present by lapse accrues from the one to the other successively, is six *calendar* months (i), (following in this case the computation of the church, and not the usual one of the common law,) and this *exclusive of the day of the avoidance (k) (18). But, if the bishop be both patron and ordinary, he shall not have a double time allowed him to collate in (l); for the forfeiture accrues by law, whenever the negligence has continued six months in the same person. And also if the bishop doth not collate his own clerk immediately to the living, and the

The title to present by lapse accrues after six months' default in the patron.

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(c) 2 Roll. Abr. 336, pl. 10.

(d) Bracton, l. 4, tr. 2, c. 3.

(e) See pag. 23.

(f) Bro. Abr. tit. *Quar. Imped.*; 3 Cro. Jac. 518.

(g) Stat. 1 Geo. I. st. 2, c. 10.

(h) Stat. 17 Edw. II. c. 8; 2 Inst. 272.

(i) 6 Rep. 62; Regist. 42.

(k) 2 Inst. 361.

(l) Gibs. Cod. 769.

(16) See *ante*, p. 23, n. (10).

(17) Mr. Christian observes, that "if a right of lapse accrues to the bishop and he dies, or is translated before he avails himself of it, the right of presentation to the lapsed benefice does not pass to the king, like the vacant patronage of the see, but to the guardian of the spiritualties. (Gibs. 770.)"

[See the case of *The Bishop of London v. The Attorney General*, cited *ante*, p. 23, n. 11.—ED.]

(18) But Sir William Grant, M. R. said, in the case of *Lester v. Garland*, 14 Ves. 255, that he did not find this position confirmed by the authority to which Blackstone refers: and Sir William Grant was right. See, however, the note to Vol. I. p. 463, where decisions are cited in which it has been ruled that the day in which an act was done may be excluded from computation, if its inclusion would work a forfeiture.

patron presents, though after the six months are lapsed, yet his presentation is good, and the bishop is bound to institute the patron's clerk (*m*). For, as the law only gives the bishop this title by lapse, to punish the patron's negligence, there is no reason that, if the bishop himself be guilty of equal or greater negligence, the patron should be deprived of his turn. If the bishop suffer the presentation to lapse to the metropolitan, the patron also has the same advantage if he presents before the archbishop has filled up the benefice; and that for the same reason. Yet the ordinary cannot, after lapse to the metropolitan, collate his own clerk to the prejudice of the archbishop (*n*). For he had no permanent right and interest in the advowson, as the patron hath, but merely a temporary one; which having neglected to make use of during the time, he cannot afterwards retrieve it. But if the presentation lapses to the king, prerogative here intervenes and makes a difference; and the patron shall never recover his right till the king has satisfied his turn by presentation: for *nullum tempus occurrit regi* (*o*). And therefore it may seem as if the church might continue void for ever unless the king shall be pleased to present, and a patron thereby be absolutely defeated of his advowson. But, to prevent this inconvenience, the law has lodged a power in the patron's hands of as it were compelling the king to present. For if, during the delay of the crown, the patron himself presents, and his clerk is instituted, the king indeed by presenting another may turn out the patron's clerk; or, after induction, may remove him by *quare impedit*: but, if he does not, and the patron's clerk dies incumbent, or is canonically deprived, the king hath lost his right, which was only to the next or first presentation (*p*).

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If the benefice become void by death or cession, the patron is bound to take notice of the vacancy; but, if by resignation or canonical deprivation, the bishop must give him notice.

*In case the benefice becomes void by death, or cession through plurality of benefices, there the patron is bound to take notice of the vacancy at his own peril; for these are matters of equal notoriety to the patron and ordinary: but in case of a vacancy by resignation, or canonical deprivation, or if a clerk presented be refused for insufficiency, these being matters of which the bishop alone is presumed

(*m*) 2 Inst. 273.

(*n*) 2 Roll. Abr. 368.

(*o*) Dr. & St. d. 2, c. 36; Cro. Car.

355.

(*p*) 7 Rep. 28; Cro. Eliz. 44.

to be cognizant, here the law requires him to give notice thereof to the patron; otherwise he can take no advantage by way of lapse (*q*) (19). Neither shall any lapse thereby accrue to the metropolitan or to the king; for it is universally true, that neither the archbishop or the king shall ever present by lapse, but where the immediate ordinary might have collated by lapse, within the six months, and hath exceeded his time: for the first step or beginning faileth, *et quod non habet principium, non habet finem* (*r*). If the bishop refuse or neglect to examine and admit the patron's clerk, without good reason assigned or notice given, he is styled a disturber by the law, and shall not have any title to present by lapse; for no man shall take advantage of his own wrong (*s*). Also, if the right of presentation be litigious or contested, and an action be brought against the bishop to try the title, no lapse shall incur till the question of right be decided (*t*).

IV. By *simony*, the right of presentation (20) to a living is forfeited and vested *pro hac vice* in the crown. Simony is the corrupt presentation of any one to an ecclesiastical benefice for money, gift, or reward. It is so called from the resemblance it is said to bear to the sin of Simon Magus, though the purchasing of holy orders seems to approach nearer to his offence. It was by the canon law a very grievous crime: and is so much the more odious, because, as Sir Edward Coke observes (*u*), it is ever accompanied with perjury; for the presentee is sworn to have committed no simony. However, it was not an offence punishable in a criminal way at the common law (*w*); it being thought sufficient to leave the clerk to ecclesiastical censures. But as these did not affect *the simoniacal patron, nor were efficacious enough to repel the notorious practice of the thing, divers acts of parliament have been made to restrain it by means of civil forfeitures, which the modern prevailing usage with regard to spiritual preferments calls aloud to be put in execution. I shall briefly consider them in this

IV. By *simony* the right of presentation is forfeited to the crown, *pro hac vice*.

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(*q*) 4 Rep. 75; 2 Inst. 632.

(*r*) Co. Litt. 344, 345.

(*s*) 2 Roll. Abr. 369.

(*t*) Co. Litt. 344.

(*u*) 3 Inst. 156.

(*w*) Moor. 564.

(19) See Vol. I. p. 392.—CH.

(20) See *ante*, p. 21, note.

place, because they divest the corrupt patron of the right of presentation, and vest a new right in the crown.

Penalties and disabilities imposed by the statutes on persons guilty of simony.

By the statute 31 Eliz. c. 6, it is for avoiding of simony enacted, that if any patron for any corrupt consideration, by gift or promise⁽²¹⁾, directly or indirectly, shall present or collate any person to an ecclesiastical benefice or dignity, such presentation shall be void, and the presentee be rendered incapable of ever enjoying the same benefice: and the crown shall present to it for that turn only^(x). But if the presentee dies without being convicted of such simony in his life-time, it is enacted by stat. 1 W. & M. c. 16, that the simoniacal contract shall not prejudice any other innocent patron, on pretence of lapse to the crown, or otherwise. Also, by the statute 12 Ann. stat. 2, c. 12, if any person for money or profit shall procure, in his own name or the name of any other, the next presentation to any living ecclesiastical, and shall be presented thereupon, this is declared to be a simoniacal contract; and the party is subjected to all the ecclesiastical penalties of simony, is disabled from holding the benefice, and the presentation devolves to the crown.

As to what species of contracts are or are not simoniacal.

Upon these statutes many questions have arisen with regard to what is and what is not simony. And, among others, these points seem to be clearly settled: 1. That to purchase a presentation, the living being actually vacant, is open and notorious simony^(y): this being expressly in the face of the statute⁽²²⁾. 2. That for a clerk to bargain for the next presentation, the incumbent being sick and about to die, was simony, even before the statute of queen Anne^(z) ⁽²³⁾: and now, by that statute, to purchase, either

^(x) For other penalties inflicted by this statute, see book iv. ch. 4, p. 62.

^(y) Cro. Eliz. 788; Moor. 914.

^(z) Hob. 165.

⁽²¹⁾ The words of the statute are, "for any sum of money, reward, gift, profit, or benefit, or for any promise, agreement, grant, bond, covenant of or for any sum of money, reward, gift, profit, or benefit."—CH.

⁽²²⁾ Mr. Christian remarks, "Lord Hardwicke was of opinion, that the sale of an advowson during a vacancy,

is not within the statute of simony, as the sale of the next presentation is; but it is void by the common law. (Ambl. 268.)"

⁽²³⁾ Mr. Christian, in his note upon the passage in the text, reminds us, that "it has been determined, that the purchase of an advowson in fee, when the incumbent was upon his death-

in his own name, or another's, the next presentation, and be thereupon presented *at any future time to the living, is direct and palpable simony. But, 3. It is held that for a father to purchase such a presentation, in order to provide for his son, is not simony: for the son is not concerned in the bargain, and the father is by nature bound to make a provision for him(*a*). 4. That if a simoniacal contract be made with the patron, the clerk not being privy thereto, the presentation for that turn shall indeed devolve to the crown, as a punishment of the guilty patron; but the clerk, who is innocent, does not incur any disability or forfeiture(*b*). 5. That bonds given to pay money to charitable uses, on receiving a presentation to a living, are not simoniacal(*c*), provided the patron or his relations be not benefited thereby(*d*); for this is no corrupt consideration moving to the patron. 6. That bonds of resignation in case of non-residence or taking any other living, are not simoniacal(*e*); there being no corrupt consideration herein, but such only as is for the good of the public. So also, bonds to resign when the patron's son comes to canonical age, are legal; upon the reason before given, that the father is bound to provide for his son(*f*). 7. Lastly, general bonds to resign at the patron's request are held to be legal(*g*)(24): for they

(*a*) Cro. Eliz. 686; Moor. 916.

(*b*) 3 Inst. 154; Cro. Jac. 385.

(*c*) Noy, 142.

(*d*) Stra. 534.

(*e*) Cro. Car. 180.

(*f*) Cro. Jac. 248, 274.

(*g*) Cro. Car. 180; Stra. 227.

bed, without any privity of the clerk who was afterwards presented, was not simoniacal, and would not vacate the next presentation. (2 Bl. Rep. 1052.)" [And though in the later case of *Fox v. The Bishop of Chester*, (2 Barn. & Cress. 658; S. C. 4 Dowl. & Ryl. 111,) the case of *Barrett v. Glubb* (the case referred to by Mr. Christian,) was repudiated by the Court of King's Bench; the principle of that case has since been re-established. In *Fox v. The Bishop of Chester*, where a contract was made for the sale of the next presentation of a living, the contracting parties at the time knowing the incumbent to be at the point of death,

it was held by the Court of King's Bench, that the contract was simoniacal, and the presentation made in pursuance thereof by the purchaser void; although the clerk presented was not privy to the transaction, and the contract was not entered into with a view to the presentation of any particular person. But this judgment was reversed, on appeal, by the House of Lords, on the 3rd of June, 1829.—ED.]

(24) In the case of *Dashwood v. Peyton*, (18 Ves. 37,) Lord Chancellor Eldon said, it was extremely difficult to reconcile the distinctions made between the simoniacal nature of general

may possibly be given for one of the legal considerations before mentioned; and where there is a possibility that a transaction may be fair, the law will not suppose it iniquitous without proof(25). But, if the party can prove the

and of particular bonds of resignation, with the principle upon which the House of Lords decided the case of *The Bishop of London v. Ffytche*: and he repeated the same observation in *Rowlatt v. Rowlatt*. (1 Jac. & Walk. 283.) The same learned Judge, in the earlier case of *Lord Kirkcudbright v. Lady Kirkcudbright*, (8 Ves. 61,) observed, that the question as to the legality of resignation bonds would never have perplexed him, if there had not been so many authorities; and it may easily be collected, his Lordship's perplexity was occasioned, not by the cases in which it had been decided that general bonds of resignation are bad, but by those other cases in which a bond for resignation of an ecclesiastical benefice in favour of a particular individual, had been held good. In the modern case of *Lord Sondes v. Fletcher* (determined in Dom. Proc. and reported in 3 Bing. 502,) it was determined, that *all* bonds of resignation were illegal: but even this decision of the highest tribunal has not proved final: the Legislature has subsequently interfered, and, it is to be hoped, has set the question at rest, by the statute of 9 Geo. IV. c. 94, whereby it is enacted, that every engagement for the resignation of any spiritual office, to the intent, as manifested by the terms of the engagement, that *any one* person whosoever, specially named and described, or one or *two* persons specially named and described, being such persons as in the act mentioned, shall be presented or appointed to such spiritual office, shall be good, valid and effectual in law, and the performance of the same shall be enforced in equity; provided such engagement shall be entered into before

the presentation or appointment of the party so entering into the same. Provided always, that where *two* persons shall be so specially named and described in such engagement, each of them shall be, either by blood or marriage, an uncle, son, grandson, brother, nephew, or grandnephew, of the patron or one of the patrons of such spiritual office, not being merely a trustee or trustees of the patronage of the same; or of the person or one of the persons for whom the patron or one of the patrons shall be a trustee or trustees; or of any married woman, whose husband in her right shall be the patron or one of the patrons of such spiritual office; or of any other person in whose right such presentation or bestowing shall be intended to be made. And it is enacted, that no presentation to any spiritual office shall be void by reason of such agreement to resign: but, the benefit of the act is not to extend to any engagement, unless the instrument by which it is entered into be deposited, within two months after the date thereof, with the registrar of the diocese or peculiar jurisdiction wherein the benefice is situated; nor unless the person named in such engagement shall be presented or appointed within six calendar months next after notice of resignation given to the patron or patrons of such spiritual office.

(25) Mr. Christian, in his note upon the text, observes, that, "in the great case of *The Bishop of London v. Ffytche*, it was determined by the House of Lords, that a general bond of resignation is simoniacal and illegal. The circumstances of that case were briefly these: Mr. Ffytche, the patron, presented Mr. Eyre, his clerk,

contract to have been a corrupt one, such proof will be admitted, in order to show the bond simoniacal, and therefore void. Neither will the patron be suffered to make an ill use of such a general bond of resignation; as, by extorting a composition for tithes, procuring an annuity for his relation, or by demanding a resignation wantonly or without good cause, such as is approved by the law: as, for the benefit of his own son, or on account of non-residence, plurality of livings, or gross immorality in the incumbent (*h*) (26).

*V. The next kind of forfeitures are those by *breach* or non-performance of a *condition* annexed to the estate, either expressly, by deed, at its original creation, or impliedly, by law, from a principle of natural reason. Both which we considered at large in a former chapter (*i*). [* 281]

V. By breach or non-performance of conditions.

VI. I therefore now proceed to another species of forfeiture, *viz.* by *waste*. Waste, *vastum*, is a spoil or destruc-

VI. By waste—

(*h*) 1 Vern. 411; 1 Eq. Cas. Abr. 86, 87; Stra. 534.

(*i*) See ch. 10, pag. 152.

to the bishop of London, for institution. The bishop refused to admit the presentation, because Mr. Eyre had given a general bond of resignation; upon this, Mr. Ffytche brought a *quare impedit* against the bishop, to which the bishop pleaded that the presentation was simoniacal and void, by reason of the bond of resignation; and to this plea Mr. Ffytche demurred. From a series of judicial decisions, the Court of Common Pleas thought themselves bound to determine in his favour; and that judgment was affirmed by the Court of King's Bench; but these judgments were afterwards reversed by the House of Lords. The principal question was this, *viz.* whether such a bond was a *reward*, *gift*, *profit*, or *benefit*, to the patron under the 31 Eliz. c. 6: if it were so, the statute had declared the presentation to be simoniacal and void. Such a bond is so manifestly intended by the parties, to be a *benefit* to the patron, that it is surprising that it should ever

have been argued and decided that it was not a *benefit* within the meaning of the statute. Yet many learned men are dissatisfied with this determination of the Lords, and are of opinion that their judgment would be different, if the question were brought before them a second time. But it is generally understood that the Lords, from a regard to their dignity, and to preserve a consistency in their judgments, will never permit a question which they have once decided, to be again debated in their house. See 1 Bro. 286. The case of *The Bishop of London v. Ffytche*, is reported at length in Cunningham's Law of Simony, p. 52."

(26) Mr. Christian observes, that, "in an action by the incumbent for the use and occupation of his glebe, the defendant cannot give in evidence the simoniacal presentation of the plaintiff. 5 T. R. 4. But it may be given in evidence by a defendant who is sued for the tithes. Hob. 168."

tion in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee-simple or fee-tail (*k*) (27).

which is either
voluntary or
permissive.

As to what con-
stitutes waste.

Waste (28) is either *voluntary*, which is a crime of commission, as by pulling down a house; or it is *permissive* (29), which is a matter of omission only, as by suffering it to fall for want of necessary reparations. Whatever does a lasting damage to the freehold or inheritance is waste (*l*). Therefore removing wainscot, floors, or other things once fixed to the

(*k*) Co. Litt. 53.

(*l*) Hetl. 35.

(27) A tenant for life has no property in timber or underwood till his estate comes into possession, and therefore cannot have an account in equity, or maintain an action of trover at law, for what has been cut wrongfully by a preceding tenant, notwithstanding his own estate, being without impeachment of waste, would have entitled him to cut such timber or underwood, and put the produce into his own pocket: (see *ante*, p. 125, n.): the owner of the first estate of inheritance, at the time when the timber was cut, is the party entitled to redress in such case. (*Pigot v. Bullock*, 1 Ves. junr. 484; *Whitfield v. Bewit*, 2 P. Wms. 241.) However, a tenant for life in remainder, though he cannot establish any property in timber actually severed during a prior estate, may bring a bill to restrain waste; and he may sustain such a suit, although he has not the immediate remainder, and notwithstanding his estate, whenever it comes into possession, will be subject to impeachment for waste; for, though he will have no right to the timber, he will have an interest in the mast and shade of the trees. (See *post*, note (35).) So, trustees to preserve contingent remainders may maintain a suit for a similar injunction, even though the contingent remainder-men have not come into *esse*. (*Perrot v. Perrot*, 3 Atk. 95; *Stansfield v. Habergham*, 10 Ves. 281; *Garth v. Cot-*

ton, 3 Atk. 754.) It is true, that, in cases of legal waste, if there be no person capable of maintaining an action, before the party who committed the waste dies, the wrong is then without a remedy at common law; but, where the question is brought within the cognizance of equity, those courts say, unauthorised waste shall not be committed with impunity; and the produce of the tortious act shall be laid up for the benefit of the contingent remainder-man. (*Marquis of Lansdowne v. Marchioness Dowager of Lansdowne*, 1 Mad. 140; *Bishop of Winchester v. Knight*, 1 P. Wms. 407; *Anonym.* 1 Ves. junr. 93.)

(28) See Vol. III. p. 223.

(29) Where an estate is given for life, without impeachment of waste *other than wilful waste*, this will excuse *permissive* waste; (*Lansdowne v. Lansdowne*, 1 Jac. & Walk. 523;) if the tenant for life, under such a limitation, cut timber, Sir Wm. Grant, M. R., seems to have felt it questionable whether the tenant could appropriate to himself the principal money produced by the sale of such timber, though he held it clear he was entitled to the interest thereof for his life: (*Wickham v. Wickham*, 19 Ves. 423; *S. C. Cooper*, 290;) but, from the case of *Williams v. Williams*, (12 East, 220,) it should appear that the tenant for life would have the entire property in timber so cut down.

freehold of a house, is waste(*m*)(30). If a house be destroyed by tempest, lightning, or the like, which is the act of Providence, it is no waste: but otherwise, if the house be burnt by the carelessness or negligence of the lessee: though now by the statute 6 Ann. c. 31 (31), no action will lie against a tenant for an accident of this kind (32). Waste may also

(*m*) 4 Rep. 54.

(30) Mr. Christian observes, "between the heir and executor there has not been any relaxation of the ancient law with regard to fixtures, for there is no reason why the one should be more favoured than the other, or the courts would be disposed to assist the heir, and to prevent the inheritance from being dismembered and disfigured. 1 Hen. Bl. 258." [See *Squier v. Mayer*, 2 Freem. 249, and the notes to that case in the last edition. See also *Wynne v. Ingleby*, 2 Dowl. & Ryl. 248, and *Ex parte Quincy*, 1 Atk. 477.—ED.]

"But the courts are more favourable to an executor of a tenant for life against a person in remainder, and therefore they have held that his executor shall have the benefit of a fire-engine erected by a tenant for life. 3 Atk. 13.

"With regard to a tenant for years, what fixtures erected by himself he may afterwards remove before the expiration of his lease, is a question of great importance. It is fully established he may take down useful and necessary erections for the benefit of his trade or manufacture, and which enable him to carry it on with more advantage.

"A tenant for years may also carry away ornamental marble chimney-pieces, wainscot fixed only by screws, and such like. But erections for the purposes of farming and agriculture do not come under the exception with respect to trade, and cannot be taken down again. See *Elwes v. Maw*, 3 East, 52." [In the case cited, it was

said to have been decided, that a cider-mill, erected by a tenant for the purposes of trade, might be removed by him. But, as between heir and executor, it seems that all the appendages of a mill, whether it be a cider-mill or a corn-mill, will pass to the heir, and not to the executor. (*Farrant v. Thompson*, 2 Dowl. & Ryl. 3.)—ED.]

"Where a tenant for years has a right to remove erections and fixtures during his lease, and omits doing it, he is a trespasser afterwards for going upon the land, but not a trespasser *de bonis asportatis*. (2 East, 88.)" [*Ex parte Quincy*, 1 Atk. 477.]

(31) Repealed by 14 Geo. III. c. 78, but the 86th section of the repealing statute declares, that no action shall lie against the person on whose premises a fire accidentally begins.

(32) A tenant who has bound himself, in general terms, to leave the premises in good repair, must rebuild if a casualty by fire occurs: (*Pym v. Blackburn*, 3 Ves. 38; *Bullock v. Dommatt*, 6 T. R. 651:) and, although his covenant to repair contains an exception in case of damage by fire, the tenant cannot, by force of this exception, (should such an accident happen,) protect himself, either at law or in equity, against the effect of a separate independent covenant to pay the rent during the term. (*Balfour v. Weston*, 1 T. R. 312; *Doe v. Sandham*, 1 T. R. 710; *Hare v. Groves*, 3 Anstr. 693, 699; *Holtzapfell v. Baker*, 18 Ves. 119.) And where a lease contains no exception in respect of accidents by fire, either in the covenant for pay-

be committed in ponds, dove-houses, warrens, and the like; by so reducing the number of the creatures therein, that there will not be sufficient for the reversioner when he comes to the inheritance (*n*). Timber also is part of the inheritance (*o*) (33). Such are oak, ash, and elm, in all places; and in some particular countries, by local custom, where other trees are generally used for building, they are for that reason considered as timber; and to cut down such trees, or top them, or do any other act whereby the timber may decay, is waste (*p*). But underwood the tenant may cut down at any seasonable time *that he pleases (*q*); and may take sufficient estovers (34) of common right for house-bote and cart-bote; unless restrained (which is usual) by particular covenants or exceptions (*r*). The conversion of land from one species to another is waste. To convert wood, meadow, or pasture, into arable; to turn arable, meadow, or pasture, into woodland; or to turn arable or woodland into meadow or pasture, are all of them waste (*s*). For, as Sir Edward Coke observes (*t*), it not only changes the course of husbandry, but the evidence of the estate; when such a close, which is conveyed and described as pasture, is found to be arable and *e converso*. And the same rule is observed, for the same reason, with regard to converting one species of edifice into another, even though it is improved in its value (*u*). To open the land to search for mines of metal, coal, &c. is waste; for that is a detriment to the inheritance (*v*) (35); but,

(*n*) Co. Litt. 53.

(*o*) 4 Rep. 62.

(*p*) Co. Litt. 53.

(*q*) 2 Roll. Abr. 817.

(*r*) Co. Litt. 41.

(*s*) Hob. 296.

(*t*) 1 Inst. 53.

(*u*) 1 Lev. 309.

(*v*) 5 Rep. 12.

ment of rent, or in the covenant to repair, should the premises be burned down, the tenant will have no equity to compel his landlord to expend any money he may have received from an insurance office in rebuilding the premises: a demurrer will hold to a bill brought for that purpose. (*Leeds v. Cheetham*, 1 Simons, 149.)

(33) See *ante*, p. 125, note, and the notes to the last page, as also the next note but one.

(34) See *ante*, pp. 35 and 122.

(35) It is in order to prevent irremediable injury to the inheritance that the Court of Chancery will grant injunctions against waste, and allow affidavits to be read in support of such injunctions: the defendant might possibly be able to pay for the mischief done, if it could ultimately be proved that his act was tortious; but, if any thing is about to be abstracted which cannot be restored *in specie*, no man

if the pits or mines were open before, it is no waste for the tenant to continue digging them for his own use(*w*); for it

(*w*) Hob. 295.

ought to be liable to have that taken away which cannot be replaced, merely because he may possibly recover (what others may deem) an equivalent in money. (*Berkeley v. Brymer*, 9 Ves. 356.) But, although Lord Nottingham, (in *Tonson v. Walker*, 3 Swanst. 679,) intimated that a probability of right might authorise an application for an injunction against waste, this was only an *obiter dictum*: it is a general rule that, in order to sustain a motion in restraint of waste, the party making the application must set forth and verify an express and positive title in himself, (or in those whose interests he has to support; see *ante*, note (27);) an hypothetical or disputed title will not do. (*Davis v. Leo*, 6 Ves. 787; *Whitelegg v. Blacklegg*, 1 Brown, 57.) A plaintiff who, after failing in ejectment, comes to equity to restrain waste, stating that the defendant claims by adverse title, it has been said, states himself out of court. (*Pillsworth v. Hopton*, 6 Ves. 51.) This *dictum* may perhaps admit occasional qualification; (see *Norway v. Rowe*, 19 Ves. 154; *Kinder v. Jones*, 17 Ves. 110; *Hodgson v. Dean*, 2 Sim. & Stu. 224;) but, clearly, where the title is disputed as between a devisee and the heir-at-law, neither an injunction to stay waste, nor a receiver, will be granted on the application of either party. (*Jones v. Jones*, 3 Meriv. 174; *Smith v. Collyer*, 8 Ves. 90.) It is not, however, to be understood, that a plaintiff, who, though he has no *legal* title, has concluded a contract authorising him to call upon the court to clothe his possession with the legal title, cannot sustain a motion in restraint of waste; provided the defendant's answer admits such contract. (*Norway v. Rowe*, 19 Ves. 155.)

In general cases, for the purpose of dissolving an injunction granted *ex parte*, the established practice is to give credit to the answer when it comes in, if it denies all the circumstances upon which the equity of the plaintiff's application rests, and not to allow affidavits to be read in contradiction to such answer: (*Clapham v. White*, 8 Ves. 36;) but, an exception to this rule is made in cases of alleged irremediable waste; (*Potter v. Chapman*, Ambl. 99;) and in cases analogous to waste; (*Peacock v. Peacock*, 16 Ves. 51; *Gibbs v. Cole*, 3 P. Wms. 254;) yet, even in such cases, the plaintiff's affidavits must not go to the question of *title*, but be confined to the question of fact as to *waste* done or threatened. (*Morphett v. Jones*, 19 Ves. 351; *Norway v. Rowe*, 19 Ves. 153; *Countess of Strathmore v. Bowes*, 1 Cox, 264.) And as to matters which the plaintiff was acquainted with when he filed his bill, he ought at that time to have stated them upon affidavit, in order to give the defendant an opportunity of explaining or denying them by his answer; (*Lawson v. Morgan*, 1 Price, 306;) though of course, acts of waste done subsequently to the filing of the bill would be entitled to a distinct consideration: (*Smythe v. Smythe*, 1 Swanst. 253;) and where allegations in an injunction bill have been neither admitted nor denied in the answer, there can be no surprise on the defendant; and it should seem, that affidavits in support of those allegations may be read, though they were not filed till after the answer was put in. (*Morgan v. Goode*, 3 Meriv. 11; *Jefferies v. Smith*, 1 Jac. & Walk. 300; *Barrett v. Tickell*, Jacob's Rep. 155; *Taggart v. Hewlett*, 1 Meriv. 499.)

is now become the mere annual profit of the land. These three are the general heads of waste, *viz.* in houses, in timber, and in land. Though, as was before said, whatever else tends to the destruction, or depreciating the value of the inheritance, is considered by the law as waste.

Who are liable
for committing
waste.

Let us next see, who are liable to be punished for committing waste. And by the feudal law, feuds being originally granted for life only, we find that the rule was general for all vassals or feudatories; "*si vasallus feudum dissipa-*

Neither vague apprehension of an intention to commit waste; nor information given of such intention by a third person, who merely states his belief, but not the grounds of his belief, will sustain an application for an injunction. The affidavits should go (not necessarily, indeed, to positive acts, but, at least,) to explicit threats. A court of equity never grants an injunction on the notion that it will do no harm to the defendant, if he does not intend to commit the act in question; an injunction will not issue unless some positive reasons are shown to call for it. (*Hannay v. M'Entire*, 11 Ves. 54; *Coffin v. Coffin*, Jacob's Rep. 72.)

It was formerly held, that an injunction ought not to go against a person who was a mere stranger, and who consequently might, by summary legal process, be turned out of possession of premises which he was injuring. Such a person, it was said, was a trespasser; but, there not being any privity of estate, waste, strictly speaking, could not be alleged against him. (*Mortimer v. Cottrell*, 2 Cox, 205.) But this technical rule is overturned; it is now established by numerous precedents, that, wherever a defendant is taking the substance of a plaintiff's inheritance, or committing or threatening irremediable mischief, equity ought to grant an injunction; although the acts are such as, in correct technical denomination, ought rather to be termed trespasses than

waste. (*Mitchell v. Dors*, 6 Ves. 147; *Hanson v. Gardiner*, 7 Ves. 309; *Twort v. Twort*, 16 Ves. 130; *Earl Cowper v. Baker*, 17 Ves. 128; *Thomas v. Oakley*, 18 Ves. 186.)

Any collusion, by which the legal remedies against waste may be evaded, will give to courts of equity a jurisdiction over such cases, often beyond, and even contrary to, the rules of law: (*Garth v. Cotton*, 3 Atk. 755:) thus, trustees to preserve contingent remainders will be prohibited from joining with the tenant for life in the destruction of that estate, for the purpose of bringing forward a remainder, and thereby enabling him to gain a property in timber, so as to defeat contingent remainder-men; and wherever there is an executory devise over, after an estate for life subject to impeachment of waste, equity will not permit timber to be cut. (*Stansfield v. Habergbam*, 10 Ves. 278; *Oxenden v. Lord Compton*, 2 Ves. jun. 71.) So though the property of timber severed during the estate of a strict tenant for life vests in the first owner of the inheritance; (see *ante*, note to p. 281;) yet, where a party having the reversion in fee, is, by settlement, made tenant for life, if he, in fraud of that settlement, cuts timber, equity will take care that the property shall be restored to, and carried throughout all the uses of, the settlement. (*Powlett v. Duchess of Bolton*, 3 Ves. 377; *Williams v. Duke of Bolton*, 1 Cox, 73.)

“*verit, aut insigni detrimento deterius fecerit, privabitur*” (*x*). But, in our ancient common law, the rule was by no means so large; for not only he that was seised of an estate of inheritance might do as he pleased with it, but also waste was not punishable in any tenant, save only in three persons; guardian in chivalry, tenant in dower, and tenant by the *curtesy (*y*); and not in tenant for life or years (*z*). And the reason of the diversity was, that the estate of the three former was created by the act of the law itself, which therefore gave a remedy against them; but tenant for life, or for years, came in by the demise and lease of the owner of the fee, and therefore he might have provided against the committing of waste by his lessee; and if he did not, it was his own default. But in favour of the owners of the inheritance, the statutes of Marlbridge 52 Hen. III. c. 23, and of Gloucester 6 Edw. I. c. 5, provided that the writ of waste (36) shall not only lie against tenants by the law of England, (or curtesy,) and those in dower, but against any farmer or other that holds in any manner for life or years. So that, for above five hundred years past, all tenants merely for life (37) or for any less estate, have been punishable or liable to be impeached for waste, both voluntary and permissive; unless their leases be made, as sometimes they are, without impeachment of waste, *absque impetitione vasti*; that is, with a provision or protection that no man shall *impetere*, or sue him for waste committed. But tenant in tail after possibility of issue extinct is not impeachable for waste; because his estate was at its creation an estate of inheritance, and so not within the statutes (*a*) (38). Neither does an action of waste lie *for the debtor* against tenant by statute, recognizance, or *elegit*; because against them the debtor may set off the damages in account (*b*): but it seems reasonable that it should lie *for the reversioner*, expectant on

(*x*) Wright, 44.

301.

(*y*) It was however a doubt whether waste was punishable at the common law in tenant by the curtesy. Regist. 72; Bro. Abr. tit. Waste, 88; 2 Inst.

(*z*) 2 Inst. 299.

(*a*) Co. Litt. 27; 2 Roll. Abr. 826, 828.

(*b*) Co. Litt. 54.

(36) The writ of waste was abolished by the statute of 3 & 4 Gul. IV. c. 27, s. 36.

(37) See *ante*, p. 122, and notes.

(38) See *ante*, p. 125, and note.

Punishment
for waste.

the determination of the debtor's own estate, or of these estates derived from the debtor (*c*).

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The punishment for waste committed was, by common law and the statute of Marlbridge, only single damages (*d*); except in the case of a guardian, who also forfeited his wardship (*e*) by the provisions of the great charter (*f*): but the statute of Gloucester directs, that the other four species of tenants shall lose and forfeit the place wherein the waste is committed, and also treble damages, to him that hath the inheritance. The expression of the statute is, "he shall forfeit the *thing* which he hath wasted;" and it hath been determined that under these words the *place* is also included (*g*). And if waste be done *sparsim*, or here and there, all over a wood, the whole wood shall be recovered; or if in several rooms of a *house, the whole house shall be forfeited (*h*); because it is impracticable for the reversioner to enjoy only the identical places wasted, when lying interspersed with the other. But if waste be done only in one end of a wood, (or perhaps in one room of a house, if that can be conveniently separated from the rest,) that part only is the *locus vastatus*, or thing wasted, and that only shall be forfeited to the reversioner (*i*).

VII. Of copyholds—by breach of the customs of the manor.

VII. A seventh species of forfeiture is that of *copyhold* estates, by *breach* of the *customs* of the manor. Copyhold estates are not only liable to the same forfeitures as those which are held in socage, for treason, felony, alienation, and waste: whereupon the lord may seise them without any presentment by the homage (*k*); but also to peculiar forfeitures annexed to this species of tenure, which are incurred by the breach of either the general customs of all copyholds, or the peculiar local customs of certain particular manors. And we may observe that, as these tenements were originally holden by the lowest and most abject vassals (39), the marks of feudal dominion continue much the strongest upon this mode of property. Most of the offences which occasioned

(*c*) F. N. B. 58.

(*d*) 2 Inst. 146.

(*e*) Ibid. 300.

(*f*) 9 Hen. III. c. 4.

(*g*) 2 Inst. 303.

(*h*) Co. Litt. 54.

(*i*) 2 Inst. 304.

(*k*) 2 Ventr. 38; Cro. Eliz. 499.

(39) See *ante*, pp. 92, 95.

a resumption of the fief by the feudal law, and were denominated *feloniæ, per quas vasallus amitteret feudum* (l), still continue to be causes of forfeiture in many of our modern copyholds. As, by subtraction of suit and service (m); *si dominum deservire noluerit* (n): by disclaiming to hold of the lord, or swearing himself not his copyholder (o); *si dominum ejuravit, i. e. negavit se a domino feudum habere* (p): by neglect to be admitted tenant within a year and a day (q); *si per annum et diem cessaverit in petenda investitura* (r): by contumacy in not appearing in court after three proclamations (s); *si a domino ter citatus non comparuerit* (t): or by refusing, when sworn of the homage, to present the truth according to his oath (u); **si pares veritatem noverint, et dicant se nescire, cum sciant* (w). In these and a variety of other cases, which it is impossible here to enumerate, the forfeiture does not accrue to the lord till after the offences are presented by the homage, or jury of the lord's court baron (x): *per laudamentum parium suorum* (y); or, as it is more fully expressed in another place (z), *nemo miles adimatur de possessione sui beneficii, nisi convicta culpa, quæ sit laudanda* (a) *per judicium parium suorum*.

Offences which entail forfeitures on copyhold tenants.

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VIII. The eighth and last method, whereby lands and tenements may become forfeited, is that of *bankruptcy*, or the act of becoming a bankrupt: which unfortunate person may, from the several descriptions given of him in our statute law, be thus defined: a trader, who secretes himself, or does certain other acts, tending to defraud his creditors.

VIII. By bankruptcy.

Who shall be such a trader, or what acts are sufficient to denominate him a bankrupt, with the several connected consequences resulting from that unhappy situation, will be better considered in a subsequent chapter (40); when we shall endeavour more fully to explain its nature, as it most

(l) Feud. l. 2, t. 26, *in calc.*

(m) 3 Leon. 108; Dyer, 211.

(n) Feud. l. 1, t. 21.

(o) Co. Copyh. s. 57.

(p) Feud. l. 2, t. 34, and t. 26, s. 3.

(q) Plowd. 372.

(r) Feud. l. 2, t. 24.

(s) 8 Rep. 99; Co. Copyh. s. 57.

(t) Feud. l. 2, t. 22.

(u) Co. Copyh. s. 57.

(w) Feud. l. 2, t. 58.

(x) Co. Copyh. s. 58.

(y) Feud. l. 1, t. 21.

(z) Ibid. t. 22.

(a) *i. e. arbitranda, definienda*. Du

Fresne, IV. 79.

(40) See chapter 31, pp. 471—488.

immediately relates to personal goods and chattels. I shall only here observe the manner in which the property of lands and tenements is transferred, upon the supposition that the owner of them is clearly and indisputably a bankrupt, and that a commission of bankrupt is awarded and issued against him.

13 Eliz. c. 7.

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21 Jac. I. c. 19.

By statute 13 Eliz. c. 7, the commissioners for that purpose, when a man is declared a bankrupt, shall have full power to dispose of all his lands and tenements, which he had in his own right at the time when he became a bankrupt, or which shall descend or come to him at any time afterwards, before his debts are satisfied or agreed for; and all lands and tenements which were purchased by him jointly with his wife or children to his own use, (or such interest therein as *he may lawfully part with,) or purchased with any other person upon secret trust for his own use; and to cause them to be appraised to their full value, and to sell the same by deed indented and inrolled, or divide them proportionably among the creditors. This statute expressly included not only free, but customary and copyhold, lands; but did not extend to estates-tail, farther than for the bankrupt's life; nor to equities of redemption on a mortgaged estate, wherein the bankrupt has no legal interest, but only an equitable reversion. Whereupon the statute 21 Jac. I. c. 19, enacts, that the commissioners shall be empowered to sell or convey, by deed indented and inrolled, any lands or tenements of the bankrupt, wherein he shall be seised of an estate-tail in possession, remainder, or reversion, unless the remainder or reversion thereof shall be in the crown; and that such sale shall be good against all such issues in tail, remainder-men, and reversioners, whom the bankrupt himself might have barred by a common recovery, or other means; and that all equities of redemption upon mortgaged estates, shall be at the disposal of the commissioners; for they shall have power to redeem the same as the bankrupt himself might have done, and after redemption to sell them. And also, by this and a former act (b), all fraudulent conveyances to defeat the intent of these statutes are declared void; but that no purchasor *bonâ fide*, for a good or valuable consideration, shall be affected by the bankrupt laws, unless

(b) 1 Jac. I. c. 15.

the commission be sued forth within five years after the act of bankruptcy committed (41).

(41) The statutes referred to in the text, with numerous others relating to bankrupts, were repealed by the act of 6 Geo. IV. c. 16, in which the whole of the bankrupt code, as at present established, is consolidated. By the 12th section of the statute just mentioned it is enacted, that commissioners appointed under the great seal shall have full power to take the order and direction of all such lands, tenements, and hereditaments, both within this realm and abroad, as well copy or customary-hold as freehold, as a bankrupt had in his own right before he became bankrupt; and also all such interest in any such lands, tenements, and hereditaments as such bankrupt might lawfully depart withal, and to make sale thereof, or otherwise order the same, for the satisfaction and payment of his creditors. And, by the 64th section, it is further enacted, that the commissioners shall, by deed indented and enrolled, convey to the assignees, for the benefit of the creditors, all lands, tenements, and hereditaments, (except copy or customary-hold,) in any part of the dominions or colonies belonging to his Majesty, to which any bankrupt is entitled, and all interest to which any such bankrupt is entitled in any of such lands, tenements, and hereditaments, and of which he might have disposed; and all such lands, tenements, and hereditaments as he shall purchase, or which shall descend, be devised, revert, or come to such bankrupt before he shall have obtained his certificate; and every such deed shall be valid against the bankrupt and against all persons claiming under him: but, by the 26th section of the statute of 1 & 2 Gul. IV. c. 56, any conveyance by the commissioners to the assignees is rendered unnecessary; and the real estate of a bankrupt vests in his assignees

by virtue of their appointment: provided, that where, according to the laws of any colony or plantation where such lands or tenements may be situated, such deed would require registration, enrolment, or recording, the certificate of appointment of the assignee shall be registered. The 65th section of 6 Geo. IV. c. 16, enacts, that the commissioners shall make sale of any lands, tenements, or hereditaments, situate either in England or Ireland, whereof the bankrupt is seised of any estate-tail in possession, reversion, or remainder, (whereof no reversion is in the crown,) and every such deed shall be good against the bankrupt and the issue of his body, and against all persons claiming under him after he became bankrupt, and against all persons whom the bankrupt by fine, common recovery, or any other means, might cut off or debar from any remainder, reversion, or other interest, in, or out of such lands, tenements, or hereditaments.

The 68th and 69th sections enact, that the commissioners shall have power to make sale of any copyhold or customary-hold lands, or of any interest to which a bankrupt is entitled therein, and thereby to entitle any persons on their behalf to surrender the same for the purpose of any purchasers being admitted thereto; such purchasers, before they enter into or take any profit of such lands, compounding with the lords of the manors of which the same are holden for such fines and other services as have theretofore been usually paid for the same; and thereupon the said lords shall grant unto such purchasers the said copyhold or customary-hold lands, for such estate or interest as shall have been sold to them as aforesaid, reserving the ancient rents, cus-

By virtue of these statutes a bankrupt may lose all his real estates; which may at once be transferred by his com-

toms, and services. The 70th section enacts, that any estates conveyed or pledged upon condition, or with power of redemption, by a man who afterwards becomes bankrupt, may be redeemed by his assignees, according to such condition, as fully as the bankrupt might have done. The 71st section enacts, that if any real estate of any bankrupt be extended after he shall have become bankrupt, upon a false pretence of his being indebted to an accountant of, or debtor to, the king, by contract originally made between the bankrupt and the said debtor or accountant to the king, a sale of such estate by the commissioners shall be valid against such extent and all persons claiming under it. The 73rd section enacts, that if any bankrupt, being at the time insolvent, shall (except upon the marriage of any of his children, or for some valuable consideration) have conveyed, assigned, or transferred any hereditaments, the commissioners shall have power to sell and dispose of the same, and such sale shall be valid against the bankrupt and all persons claiming under him. The 76th section enacts, that if any bankrupt shall have entered into any agreement for the purchase of any estate or interest in land, the vendor may compel the assignees to elect whether they will abide by and execute such agreement, or deliver up the same, and the possession of the premises. The 77th section enacts, that all powers vested in a bankrupt which he might legally execute for his own benefit (except the right of nomination to any vacant ecclesiastical benefice, see *ante*, p. 21, note (3) to chapter 3,) may be executed by the assignees. The 78th section enacts, that the Lord Chancellor may order bankrupts to join in conveyances of

their real estates, and if they shall not execute such conveyances within the time directed, they, and all persons claiming under them, shall be stopped from objecting to the validity of the conveyances; and all estate, right, and title, which the bankrupts had in such tenements, shall be as effectually barred by such order, as if the conveyances had been executed by the bankrupts. The 79th section enacts, that if any bankrupt shall, as trustee, either alone or jointly, be seised of, or entitled to, any real estate, or any interest secured upon or arising out of the same, the Lord Chancellor may order the assignees, and all persons whose act or consent thereto is necessary, to convey, assign, or transfer the said estate to such persons as the Lord Chancellor shall think fit, upon the same trusts as the said estate was subject to before the bankruptcy, or such of them as shall be then subsisting and capable of taking effect. The 81st section enacts, that all conveyances by, and all contracts by and with any bankrupt, *bond fide* made and entered into more than two calendar months before the issuing of the commission against him, and all executions and attachments against the lands and tenements of such bankrupt, executed or levied more than two calendar months before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed; provided the person so dealing with such bankrupt had not, at the time of such conveyance, contract, dealing, or transaction, notice of any prior act of bankruptcy by the said bankrupt committed. The 83rd section enacts, that the issuing of a commission shall be deemed notice of a prior act of bankruptcy, (if an act of bankruptcy had been actually committed before the

missioners to their assignees, without his participation or consent.

issuing of the commission,) if the adjudication has been notified in the London Gazette, and the persons affected by such notice may reasonably be presumed to have seen it. But, the 86th section enacts, that no purchase from any bankrupt *bond fide* and for valuable consideration, though the purchaser had notice at the time of such purchase of an act of bankruptcy by such bankrupt committed, shall be impeached by reason thereof, unless the commission shall have been sued out within twelve calendar months after such act of bankruptcy. And the 87th section enacts, that no title to any real estate sold under a commission or order in bankruptcy, shall be impeached by the bankrupt, or any person claiming under him, in respect of any defect in the suing out the commission, or in any of the proceedings under the same, unless the bank-

rupt shall have commenced proceedings to supersede the said commission, and duly prosecuted the same, within twelve calendar months from the issuing thereof.

These are the statutory provisions at present affecting the real estates of bankrupts.

By the statute of 1 & 2 Gul. IV. c. 56, a distinct court of bankruptcy was established, to which the jurisdiction in bankruptcy was transferred; subject to an appeal to the lord chancellor on matters of law and equity, or on refusal of admission of evidence, only. And by virtue of the 26th section of the statute of 3 & 4 Gul. IV. c. 41, the two *puisnè* judges of the court may act as a court, whenever the chief judge is attending at the judicial committee of the privy council.

CHAPTER XIX.

OF TITLE BY ALIENATION.

Of title by alienation or conveyance.

THE most usual and universal method of acquiring a title to real estates is that of alienation, conveyance, or purchase in its limited sense; under which may be comprised any method wherein estates are voluntarily resigned by one man, and accepted by another: whether that be effected by sale, gift, marriage, settlement, devise, or other transmission of property by the mutual consent of the parties.

Alienation by the feodal law.

This means of taking estates by alienation is not of equal antiquity in the law of England with that of taking them by descent. For we may remember that, by the feodal law (*a*), a pure and genuine feud could not be transferred from one feudatory to another without the consent of the lord; lest thereby a feeble or suspicious tenant might have been substituted and imposed upon him to perform the feodal services, instead of one on whose abilities and fidelity he could depend. Neither could the feudatory then subject the land to his debts; for, if he might, the feodal restraint of alienation would have been easily frustrated and evaded (*b*). And, as he could not aliene it in his life-time, so neither could he by will defeat the succession, by devising his feud to another family; nor even alter the course of it, by imposing particular limitations, or prescribing an unusual path of descent. Nor, in short, could he aliene the estate, even with the consent of the lord, unless he had also obtained the consent of his own next apparent or presumptive heir (*c*). And therefore it was very usual in ancient

(*a*) See pag. 57, [and 47, n.]

(*b*) Feud. l. 1, t. 27.

(*c*) Co. Litt. 94; Wright, 168.

feoffments to express that *the alienation was made by consent of the heirs of the feoffor; or sometimes for the heir apparent himself to join with the feoffor in the grant(*d*). And, on the other hand, as the feudal obligation was looked upon to be reciprocal, the lord could not aliene or transfer his signiory without the consent of his vassal: for it was esteemed unreasonable to subject a feudatory to a new superior, with whom he might have a deadly enmity, without his own approbation; or even to transfer his fealty, without his being thoroughly apprised of it, that he might know with certainty to whom his renders and services were due, and be able to distinguish a lawful distress for rent from a hostile seizing of his cattle by the lord of a neighbouring clan(*e*). This consent of the vassal was expressed by what was called *attorning*(*f*), or professing to become the tenant of the new lord; which doctrine of attornment was afterwards extended to all lessees for life or years. For if one bought an estate with any lease for life or years standing out thereon, and the lessee or tenant refused to attorn to the purchasor, and to become his tenant, the grant or contract was in most cases void, or at least incomplete(*g*): which was also an additional clog upon alienations.

But by degrees this feudal severity is worn off; and experience hath shewn, that property best answers the purposes of civil life, especially in commercial countries, when its transfer and circulation are totally free and unrestrained. The road was cleared in the first place by a law of king Henry the first, which allowed a man to sell and dispose of lands which he himself had purchased; for over these he was thought to have a more extensive power than over what had been transmitted to him in a course of descent from his ancestors(*h*): *a doctrine which is countenanced by the

Formerly, a man was only allowed to dispose of those lands which he himself had purchased.

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(*d*) Madox, Formul. Angl. No. 316, 319, 427.

(*e*) Gilb. Ten. 75.

(*f*) The same doctrine and the same denomination prevailed in Bretagne—*possessiones in jurisdictionibus non aliter apprehendi posse, quam per attournances et avirances, ut loqui solent; cum vasallus, ejurato prioris domini obsequio et fide, novo se sacra-*

mento novo item domino acquirenti obstiingebat; idque jussu auctoris. D'Argentre Antiq. Consuet. Brit. apud Dufresne, i. 819, 820.

(*g*) Litt. s. 551.

(*h*) *Emptiones vel acquisitiones suas det cui magis velit. Terram autem quam ei parentes dederunt, non mittat extra cognationem suam.* LL. Hen. I. c. 70.

feodal constitutions themselves(*i*): but he was not allowed to sell the whole of his own acquirements, so as totally to disinherit his children, any more than he was at liberty to aliene his paternal estate(*k*). Afterwards, a man seems to have been at liberty to part with all his own acquisitions, if he had previously purchased to him and his *assigns*, by name: but, if his *assigns* were not specified in the purchase deed, he was not empowered to aliene(*l*): and also he might part with one-fourth of the inheritance of his ancestors without the consent of his heir(*m*). By the great charter of Henry III.(*n*), no subinfeudation was permitted of part of the land, unless sufficient was left to answer the services due to the superior lord, which sufficiency was probably interpreted to be one half or moiety of the land(*o*). But these restrictions were in general removed by the statute of *quia emptores*(*p*), whereby all persons, except the king's tenants *in capite*, were left at liberty to aliene all or any part of their lands at their own discretion(*q*). And even these tenants *in capite*, were by the statute 1 Edw. III. c. 12, permitted to aliene, on paying a fine to the king(*r*). By the temporary statutes 7 Hen. VII. c. 3, and 3 Hen. VIII. c. 4, all persons attending the king in his wars were allowed to aliene their lands without license, and were relieved from other feodal burdens. And lastly, these very fines for alienations were, in all cases of freehold tenure, entirely abolished by the statute 12 Car. II. c. 24. As to the power of *charging* lands with the debts of the owner, this was introduced so early as stat. Westm. 2, which(*s*) subjected a *moiety* of the tenant's lands to executions, for debts recovered by law: as the *whole* of them was likewise subjected to be pawned in a statute merchant by the statute *de mercatoribus*, made the same year, and in a statute staple by statute 27 Edw. III. c. 9, and in other similar recognizances by statute

(*i*) Feud. l. 2, t. 39.

(*k*) *Si questum tantum habuerit is, qui partem terrae suae donare voluerit, tunc quidem hoc ei licet; sed non totum questum, quia non potest filium suum hæredem exhæredare.* Glanvil. l. 7, c. 1.

(*l*) Mirr. c. 1, s. 3. This is also borrowed from the feodal law. Feud,

l. 2, t. 48.

(*m*) Mirr. ibid.

(*n*) 9 Hen. III. c. 32.

(*o*) Dalrymple of Feuds, 95.

(*p*) 18 Edw. I. c. 1.

(*q*) See pag. 72, 91.

(*r*) 2 Inst. 67.

(*s*) 13 Edw. I. c. 18.

23 Hen. VIII. c. 6. And now, the whole of them is not only subject to be *pawned* for the debts of the owner, but likewise to be absolutely *sold* for the benefit of trade and commerce by the several statutes of bankruptcy. The restraint of *devising* lands by will, except in some places by particular custom, lasted longer; that not being totally removed, till the abolition of the military tenures. The doctrine of *attornments* continued still later than any of the rest, and became extremely troublesome, though many methods were invented to evade them; till at last, they were made no longer necessary to complete the grant or conveyance, by statute 4 & 5 Ann. c. 16, nor shall, by statute 11 Geo. II. c. 19, the attornment of any tenant affect the possession of any lands, unless made with consent of the landlord, or to a mortgagee after the mortgage is forfeited, or by direction of a court of justice.

The doctrine of attornments.

In examining the nature of alienation, let us first inquire briefly, *who* may aliene, and to *whom*; and then, more largely, *how* a man may aliene, or the several modes of conveyance.

I. Who may aliene, and to whom: or, in other words, who is capable of conveying and who of purchasing (1).

I. Who may aliene, and to whom.

(1) It may be laid down as a general rule, that all those who have attained the age of twenty-one years, who are of sound mind and understanding, and not under the power of others, may be parties to, and bind themselves by, deed. Persons, who are blind, deaf, or dumb, may convey by deed, if it appear, that, notwithstanding these infirmities, they are capable of comprehending the nature and consequences of a deed, and can express their meaning by writing or signs. But, a person who has laboured under *all* the incapacities above specified from the time of his birth, can have had no means of acquiring that information, without which the law will not allow a gift or grant to be valid. (Perkins, chap. 1, sect. 25.)

A corporation, whether sole or aggregate, may be party to a deed; and, in many cases, is capable of acquiring,

or conveying away, real property by deed. But a dean without his chapter, a mayor without his commonalty, or the master of a college without his fellows, cannot, by executing a deed, bind the corporation. (*Smith v. Barrett & Clifford*, 1 Sid. 162; *Mayor and Commonalty of Colchester v. Lowten*, 1 Ves. & Bea. 244; *Case of Sutton's Hospital*, 10 Rep. 30 b; Co. Litt. 94 b.) And though lay civil corporations might, before the 94th section of the statute of 5 & 6 Gul. IV. c. 76, restrained that power, have freely aliened their lands, (except for electioneering purposes, as to which, see the statute of 3 & 4 Gul. IV. c. 69, s. 3,) ecclesiastical and eleemosynary corporations are restrained (as will be seen in the next chapter, p. 320) from almost every mode of alienation, except that of leasing, and in the exercise of that power are placed under

What may or
may not be
aliened or as-
signed.

And herein we must consider rather the incapacity, than capacity, of the several parties; for all persons in *possession* are *prima facie* capable of conveying, and all persons whatsoever of purchasing, unless the law has laid them under any particular disabilities(2). But, if a man has only in him the *right* of either possession or property, he cannot convey it to any other, lest pretended titles might be granted to great men, whereby justice might be trodden down, and the weak oppressed(s). Yet reversions and vested remainders may be granted; because the possession of the particular tenant is the possession of him in reversion or remainder; but *contingencies*, and mere *possibilities*, though they may be released, or devised by will(3), or may pass to the heir or executor, yet cannot (it hath been said) be assigned to a stranger, unless coupled with some present interest(t)(4).

(s) Co. Litt. 214.

239, 322; 11 Mod. 152; 1 P. Wms.

(t) Sheppard's Touchstone, 238,

574; Stra. 132.

considerable restriction by the legislature. However, by the statute of 55 Geo. III. c. 147, amended and extended by 56 Geo. III. c. 52; 1 Geo. IV. c. 6; and 6 Geo. IV. c. 8, incumbents of ecclesiastical benefices are enabled to exchange parsonage houses and glebe lands, with the consent of the bishop and patron, for other houses and lands; and also to purchase lands to be annexed to such benefices as glebe land thereof; and by mortgage of their tithes, rents, and other profits, to raise money for such purchases.

(2) By the common law, all persons whatever may be grantees in a deed, because it is supposed to be for their benefit. (Co. Litt. 2.)

(3) It is now well established, as a general rule, that possibilities (not meaning thereby *mere hopes* of succession, *Carleton v. Leighton*, 3 Meriv. 671; *Jones v. Roe*, 3 T. R. 93, 96) are devisable: for a disposition of equitable interests in land, though not good at law, may be sustained in equi-

ty. (*Perry v. Phelps*, 1 Ves. junr. 254; *Scawen v. Blunt*, 7 Ves. 300; *Moor v. Hawkins*, 2 Eden, 343.) But, the generality of the doctrine that *every* equitable interest is devisable, requires at least one exception;—the devisee of a copyhold must be considered as having an equitable interest therein; but it has been decided, that he cannot devise the same before he has been admitted. (*Wainwright v. Elwell*, 1 Mad. 627. And see *post*, p. 371, n.) So, under a devise to two persons, or to the survivor of them, and the estate to be disposed of by the survivor, by will, as he should think fit; it was held, that the devisees took as tenants in common for life, with a contingent remainder in fee to the survivor; but that such contingent remainder was not devisable by a will made by one of the tenants in common in the lifetime of both. (*Doe v. Tomkinson*, 2 Mau. & Sel. 170.)

(4) Mr. Christian observes, “a covenant for a valuable consideration to settle or convey a possibility, when

Persons attainted of treason, felony, and *præmunire*, are incapable of conveying, from the time of the offence committed, provided attainder follows(*u*): for such conveyance by them may tend to defeat the king of his forfeiture, or the *lord of his escheat(5). But they may *purchase* for the benefit of the crown, or the lord of the fee, though they are disabled to *hold*: the lands so purchased, if after attainder, being subject to immediate forfeiture; if before, to escheat, as well as forfeiture, according to the nature of the crime(*w*). So also, corporations, religious or others, may purchase lands; yet, unless they have a licence to hold in mortmain, they cannot retain such purchase; but it shall be forfeited to the lord of the fee.

Persons attainted of treason, &c., are incapable of conveying.

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Idiots and persons of nonsane memory, infants, and persons under duress, are not totally disabled either to convey or purchase, but *sub modo* only. For their conveyances and purchases are voidable, but not actually void(6). The

Conveyances and purchases by idiots, infants, and persons insane or under duress, are voidable.

(*u*) Co. Litt. 42.

(*w*) Ibid. 2.

it arises, will be enforced in equity. (Fonbl. Tr. of Eq. 202.)"

(5) See *ante*, pp. 72, 244.

(6) Mr. Sugden, in his learned Treatise on Powers, (pp. 395, 396,) thus corrects the passage in the text: "Although a deed executed by a lunatic may be set aside by the committee of a lunatic, or by his heirs after his death; yet, it is incontrovertibly established, that the party himself cannot, after he has recovered his senses, plead his lunacy in avoidance of the deed. (*Beverley's case*, 4 Rep. 123 b; *Stroud v. Marshall*, Cro. Eliz. 398.) But, a distinction has been established by the case of *Yates v. Boen*, (2 Str. 1104,) which does not appear to have been attended to by writers on this subject, although they refer to the case. To debt upon articles, the defendant pleaded *non est factum*; and upon the trial, offered to give the lunacy in evidence. The Chief Justice thought it ought not to be admitted, upon the rule in *Beverley's case*, that a man shall not stultify himself;

but, on the authority of *Smith v. Carr*, (decided the 5th of July, 1728,) where Chief Baron Pengelly in the like case admitted it, and on considering the case of *Thompson v. Leach*, (Comb. 468,) the Chief Justice permitted it to be given in evidence, and the plaintiff upon the evidence became nonsuit. Now, the history of this revolution in this branch of the law is this: when *Beverley's case* was decided, it was holden, that deeds executed by lunatics were voidable only, but not actually void, and therefore they could only be set aside by special pleading, and by the rule of law the party could not stultify himself. And Mr. Justice Blackstone, following the old rule, has laid it down, that deeds of lunatics are avoidable only, and not actually void. But, in *Thompson v. Leach*, this distinction was solemnly established, that a feoffment with livery of seisin by a lunatic, because of the solemnity of the livery, was voidable only, but that a bargain and sale, or surrender, &c., was actually void.

king, indeed, on behalf of an idiot, may avoid his grants or other acts(*x*). But it hath been said, that a *non compos*

(*x*) Co. Litt. 247.

This, therefore, was the ground of the decision in *Yates v. Boen*. When the Chief Justice remembered that an innocent conveyance, or a deed, by a lunatic was merely void, he instantly said that *non est factum* might be pleaded to it, and the special matter given in evidence. But in the case of a feoffment with livery of seisin, the rigorous rule of law still prevails, and the party cannot stultify himself." Since this note was first published, it has been enacted by the statute of 3 & 4 Gul. IV. c. 74, that no fines should be levied, or common recoveries suffered, after the last day of December, 1833, but as the validity of fines and recoveries effected before that date may still come under discussion, it has been thought not inexpedient to retain the remainder of this note.

By the statute *de modo levandi fines*, (18 Edw. I. c. 4,) all those who, from defect of understanding, are by law incapable of contracting, are likewise held incapable of being cognizors in a fine; it has been determined, however, that notwithstanding any legal defects in the cognizor, if the judges once admit him to levy a fine, (even after he has been found a lunatic by inquisition, *Mary Portington's case*, 10 Rep. 42,) such fine will for ever afterwards be in every court valid, and at law effectual; upon the principle that no averment can be admitted to contradict a record. (*Beverley's case*, 4 Rep. 124; *Mansfield's case*, 12 Rep. 124; *Lewin's case*, cited in 10 Rep. 42.) The rule with respect to a common recovery is the same as in the case of a fine. A *non compos* ought not to be permitted to suffer a recovery; but the act, if permitted, will be legally binding: in this case, the legal maxim is, *fieri non de-*

bet, sed factum valet. And all acts of record, as, for instance, recognizances entered into, and statutes acknowledged, by a *non compos*, are legally binding upon himself, his heirs, executors, and administrators: however, as a lunatic is incapable of executing a valid deed, if he attempt to suffer a recovery *by his attorney*, (to whom he has executed an instrument empowering him so to act,) or if he affects to make a tenant to the *præcipe* by deed, such instruments, being merely matters *in pais*, may be avoided, and the recovery suffered in pursuance of such void deed will be void also. (*Roberts's case*, 3 Atk. 312; *Sir Butler Wentworth's case*, cited in 2 Ves. senr. 403.) But, if a person whose sanity at the time is attested by an inquisition returned under a commission *de lunatico inquirendo*, make a tenant to the *præcipe* by fine, in order to suffer a recovery; although he do not suffer the recovery in person, but acknowledge a warrant of attorney for that purpose before a judge, these judicial acts will be held so conclusive, that parol evidence will not be admitted to prove the party to have been *non compos*, at the time of the caption of the fine and acknowledgment of the warrant of attorney. (*Hume v. Burton*, 1 Ridgw. P. C. 16, 204, 554.)

Still, though after the adjudications on the subject the legal validity of a fine levied, or of a recovery suffered in person by a lunatic, cannot be disputed, it must not be inferred that a court of equity, because it cannot reverse such fine or recovery, can give no relief. In the case of *Addison v. Dawson, Mascal et al.* (2 Vern. 678,) *Dawson* obtained a conveyance of an estate, by fine and recovery, greatly under value, by connivance of *Mascal*,

himself, though he be afterwards brought to a right mind, shall not be permitted to allege his own insanity in order to avoid such grant: for that no man shall be allowed to stultify himself, or plead his own disability. The progress of this notion is somewhat curious. In the time of Edward I., *non compos* was a sufficient plea to avoid a man's own

the solicitor of *Addison*, who was subsequently found to be a lunatic, by inquisition overreaching the fraudulent transaction, and the court (as the report states the case) *set aside* the sale. But, in *Roberts's case*, (3 Atk. 310,) the note in *Vernon* was declared to be imperfect, as had been discovered by examination of the register's book: (see Reg. Lib. 1711, A. fol. 326, which reference the present writer has verified :) and Lord Hardwicke observed, that "in *Addison v. Mascal*, the lunatic was *bound*, because there was a fine." In fact, the conveyances by fine and recovery were not treated as nullities and *set aside*; on the contrary, they were ordered to stand good as securities for actual advances; they were so far, only, controlled as they purported to evidence an absolute purchase: and this was in strict conformity with the acknowledged jurisdiction of courts of equity, which (admitting that fines and recoveries are binding in equity as well as at law,) when fraud is apparent on the part of the persons claiming under such assurances, will declare them to be only *trustees* for the parties defrauded, and decree a *reconveyance*. (*Parkes v. White*, 11 Ves. 230; *Coleby v. Smith*, 1 Vern. 205; *Wilkinson v. Brayfield*, 2 Vern. 307; *Pickett v. Loggon*, 14 Ves. 234; *Day v. Hungat*, 1 Roll. Rep. 115, 116; *Baker v. Pritchard*, 2 Atk. 389; *Pincke v. Thorneycroft*, 4 Br. P. C. 92, Toml. ed.)

This was the very course pursued in the case of *Addison v. Mascal*, which,

therefore, is not to be considered as in opposition to the current of authorities, with respect to the force of a fine levied, or a recovery suffered, by a lunatic. Neither is it by any means clear, that the case of *Clerk v. Clerk*, (2 Vern. 412,) which Mr. Raithby refers to in his note upon the case of *Addison v. Mascal*, is anomalous on this point, as that learned gentleman supposed: the inference which he drew from the direction of an issue in *Clerk v. Clerk*, would doubtless be just, if the fact upon which he founded it did not appear to be misconceived. The issue directed does not seem to have had any relation to the settlement in that case, which was confirmed by fine and recovery; *that* appears, by the report itself, (imperfect as it is,) to have been acquiesced in. The issue, therefore, could only have directed with reference to the *subsequent* settlement, which there is no reason for believing to have been made by act of record. There is, in fact, ground for concluding to the contrary; as, although the registers have been searched in vain, by the present editor, for the final decision of the case, still, an interlocutory order, to be found in Reg. Lib. 1700, A. fol. 139, supports the opinion that the second settlement was not made by any judicial act of record; but was merely an act *in pais*, executed between the parties by deed, dated 16th October, 1688.

Great part of this note is extracted from 2 Hovenden on Frauds, 488—492.

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bond(*x*) and there is a writ in the register(*y*) for the alienor himself to recover lands aliened by him during his insanity; *dum fuit non compos mentis suæ, ut dicit, &c.* But under Edward III. a scruple began to arise, whether a man should be permitted to *blemish* himself, by pleading his own insanity(*z*): and, afterwards, a defendant in assise having pleaded a release by the plaintiff since the last continuance, to which the plaintiff replied (*ore tenus*, as the manner then was) that he was out of his mind when he gave it, the court adjourned the assise; doubting, whether, as the plaintiff was sane both then and at the commencement of the suit, he should be permitted to plead an intermediate deprivation of reason; and the question was asked, how he came to remember the release, if out of his senses when he gave it(*a*). Under Henry VI. this way of *reasoning (that a man shall not be allowed to disable himself, by pleading his own incapacity, because he cannot know what he did under such a situation) was seriously adopted by the judges in argument(*b*); upon a question, whether the heir was barred of his right of entry by the feoffment of his insane ancestor. And from these loose authorities, which Fitzherbert does not scruple to reject as being contrary to reason(*c*), the maxim that a man shall not stultify himself hath been handed down as settled law(*d*): though later opinions, feeling the inconvenience of the rule, have in many points endeavoured to restrain it(*e*). And, clearly, the next heir, or other person interested, may, after the death of the idiot or *non compos*, take advantage of his incapacity and avoid the grant(*f*). And so too, if he purchases under this disability, and does not afterwards upon recovering his senses agree to the purchase, his heir may either waive or accept the estate at his option(*g*). In like manner, an infant may waive such purchase or conveyance, when he comes to full age; or, if he does not then actually agree to it, his heirs

But such conveyances may be either confirmed or avoided—by the idiot or *non compos*, upon recovering his senses—by the infant, when of full age—or, when the duress has ceased.

(*x*) Britton, c. 28, fol. 66.

(*y*) Fol. 228. See also Memorand. Scacch. 22 Edw. I. (prefixed to Maynard's Year-book, Edw. II.) fol. 23.

(*z*) 5 Edw. III. 70.

(*a*) 35 Assis. pl. 10.

(*b*) 39 Hen. VI. 42.

(*c*) F. N. B. 202.

(*d*) Litt. s. 405; Cro. Eliz. 398; 4 Rep. 123; Jenk. 40.

(*e*) Comb. 469; 3 Mod. 310, 311; 1 Eq. Cas. Abr. 279.

(*f*) Perkins, s. 21.

(*g*) Co. Litt. 2.

may waive it after him (*h*). Persons also, who purchase or convey under duress, may affirm or avoid such transaction, whenever the duress is ceased (*i*) (7). For all these are under the protection of the law; which will not suffer them to be imposed upon, through the imbecility of their present condition; so that their acts are only binding, in case they be afterwards agreed to, when such imbecility ceases. Yet the guardians or committees of a lunatic, by the statute of 11 Geo. III. c. 20, are empowered to renew in his right, under the directions of the court of chancery, any lease for lives or years, and apply the profits of such renewal for the benefit of such lunatic, his heirs or executors (8).

(*h*) Co. Litt. 2.

(*i*) 2 Inst. 483; 5 Rep. 119.

(7) Where a deed has been prepared in pursuance of personal instructions of the conveying party; yet, if it be proved that such party, though appearing to act voluntarily, was in fact not a free agent, but so subdued by harshness and cruelty that the deed spoke the mind, not of the party executing, but of another, such deed cannot, in equity, stand: though it may be difficult to make out a case of legal duress. (*Peel v. —*, 16 Ves. 159, citing *Lady Strathmore v. Bowes*, 1 Ves. jun. 22.) When the execution of a deed is prevented, or compelled, by force or artifice, equity will give relief, (*Middleton v. Middleton*, 1 Jac. & Walk. 96,) in favour of a volunteer, and even, in some cases, as against innocent parties; (*Mastaer v. Gillespie*, 11 Ves. 639;) for, it would be almost impossible ever to reach a case of fraud, if third parties were allowed to retain *gratuitous* benefits, which they have derived from the fraud, imposition, or undue influence practised by others. (*Huguenin v. Baseley*, 14 Ves. 289; *Stilwell v. Wilkins*, Jacob's Rep. 282.) Still, it would be pushing this principle too far to extend it to innocent purchasers: (*Lloyd v. Passingham*, Coop. 155:) it is only when an estate has been obtained by a third person with-

out payment, or with notice of fraud, that a court of equity will take it from him, to restore it to the party who has been defrauded of it; (*Mackreth v. Symmons*, 15 Ves. 340;) a *bond fide* purchaser, for valuable consideration and without notice, will not be deprived of the advantage which his legal title gives him. (*Jerrard v. Saunders*, 2 Ves. jun. 457.)

(8) The statute cited in the text has been repealed, in order to consolidate the laws upon this subject; and by virtue of the statute of 11 Geo. IV. & 1 Gul. IV. c. 65, the Lord Chancellor may empower and direct the committee of a lunatic to *surrender* existing leases to which the lunatic is entitled, in order to obtain renewals thereof, to the same uses, and liable to the same trusts and conditions, as the former leases; and also to accept surrenders and grant new leases, in all cases in which the lunatic, if not under disability, might be compelled to do so; or in which it shall appear to be for his benefit to renew. The Lord Chancellor may, also, order the sale or mortgage of the estates of lunatics, for certain purposes; and it is enacted that committees may not only grant leases of tenements in which a *non compos* has an absolute estate, but, where the lunatic has a

Purchase by a
feme covert,
voidable ;

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conveyance
void.

The case of a feme covert is somewhat different. She may *purchase* an estate without the consent of her husband, and the conveyance is good during the coverture, till he avoids *it by some act declaring his dissent(*k*). And, though he does nothing to avoid it, or even if he actually consents, the feme covert herself may, after the death of her husband, waive or disagree to the same : nay, even her heirs may waive it after her, if she dies before her husband, or if in her widowhood she does nothing to express her consent or agreement(*l*). But the *conveyance* or other contract of a feme covert (except by some matter of record) is absolutely void, and not merely voidable(*m*) ; and therefore cannot be affirmed or made good by any subsequent agreement(*9*).

(*k*) Co. Litt. 3.

(*l*) Ibid.

(*m*) Perkins, s. 154 ; 1 Sid. 120.

limited estate with a power of granting leases on fines, for lives or years, such power may be executed by his committee under the direction of the great seal.

Where estates and funds are vested in trustees or mortgagees, who are infants, idiots, lunatics, or of unsound mind, or who cannot be compelled or refuse to act, the conveyance and transfer of such property is provided for by the statute of 11 Geo. IV. & 1 Gul. IV. c. 60.

(9) The rule laid down in the text must be understood with some obvious qualifications. The possession by a married woman of property settled to her separate use, may, as a necessary incident, carry with it the right of disposition over such property. (*Rich v. Cockell*, 9 Ves. 375 ; *Fettilplace v. Gorges*, 1 Ves. jun. 49 ; *Tappenden v. Walsh*, 1 Phillim. 352 ; *Grigby v. Cox*, 1 Ves. sen. 518 ; *Bell v. Hyde*, Prec. in Cha. 330.) A court of equity has no power to set aside, but is bound to give effect to, a disposition made by a *feme coverte* of property settled to her separate use, though such disposition be made in favour of her husband, or even of her

own trustee ; notwithstanding it may be plain, that the whole object of the settlement in the wife's favour may be counteracted by this exercise of her power. (*Pybus v. Smith*, 1 Ves. jun. 194 ; *Parkes v. White*, 11 Ves. 221, 222 ; *Jackson v. Hobhouse*, 2 Meriv. 487 ; *Nantes v. Corrock*, 9 Ves. 189 ; *Sperling v. Rochfort*, 8 Ves. 175 ; *Sturgis v. Corp*, 13 Ves. 190 ; *Glyn v. Baxter*, 1 Younge & Jerv. 332 ; *Acton v. White*, 1 Sim. & Stu. 432.) And the assent of trustees to whom property is given for the separate use of a married woman, is not necessary to enable her to bind that property as she thinks fit ; unless such assent is required by the instrument under which she is beneficially entitled to that property. (*Essex v. Atkins*, 14 Ves. 547 ; *Brown v. Like*, 14 Ves. 302 ; *Pybus v. Smith*, 1 Ves. jun. 194.)

So, as Mr. Sugden, in the 3rd chapter of his Treatise on Powers, adduces numerous authorities to prove, it has long been settled, that a married woman may exercise a power over land, or, in other words, direct a conveyance of that land, whether the power be appendant, in gross, or

The case of an alien born is also peculiar. For he may ^{Aliens.} purchase any thing; but after purchase he can *hold* nothing except a lease for years of a house for convenience of merchandize (10), in case he be an alien friend: all other pur-

simply collateral; and as well whether the estate be copyhold or freehold. (*Doe v. Staple*, 2 T. R. 695; *Tomlinson v. Dighton*, 1 P. Wms. 149; *Hearle v. Greenbank*, 3 Atk. 711; *Peacock v. Monk*, 2 Ves. sen. 191; *Wright v. Englefield*, Ambl. 473; *Driver v. Thompson*, 4 Taunt. 297.) And it would operate palpable injustice, if, where a married woman held property in trust as executrix, or *en autre droit*, she could not convey and dispose of the same, as the duties of her trust required. (*Scammel v. Wilkinson*, 2 East, 557; *Perkins*, ch. 1, sect. 7.)

No doubt, the separate estate of a *feme covert* cannot be reached as if she were a *feme sole*, without some charge on her part, either express or to be *implied*: it seems, however to be settled, notwithstanding the dislike of the principle, which has been often expressed, (*Jones v. Harris*, 9 Ves. 497; *Nantes v. Corrock*, 9 Ves. 189; *Heatley v. Thomas*, 15 Ves. 604,) that when a wife joins with her husband in a security, this is an *implied* execution of her power to charge her separate property. (*Greatley v. Noble*, 3 Mad. 94; *Stuart v. Lord Kirkwall*, 3 Mad. 389; *Hulme v. Tennant*, 1 Brown, 20; *Sperling v. Rochfort*, 8 Ves. 175.) And by joining in a sale with her husband by fine, or an equivalent simpler form of assurance by which fines have been superseded, a married woman may clearly come under obligations affecting her separate trust estate. (*Parkes v. White*, 11 Ves. 221, 224.) A court of equity will certainly not interfere without great reluctance, for the purpose of giving effect to the improvident en-

gagement of a married woman, for the accommodation of her husband; but where it appears in evidence that she was a free agent, and understood what she did when she engaged her separate property, a court of equity, it has been held, is bound to give effect to her contract. (*Essex v. Atkins*, 14 Ves. 547.) Or rather, perhaps, it may be more correctly put, to say, that although a *feme covert* cannot, by the equitable possession of separate property, acquire a power of personal contract, yet she has a power of disposition as incident to property, and her actual disposition will bind her. (*Aguilar v. Aguilar*, 5 Mad. 418.) The distinction between the mere contract, or general engagement of a married woman, and an *appropriation* of her separate estate, has been frequently recognized: (*Power v. Bailey*, 1 Ball & Beat. 52:) she can enter into no contract affecting her person, the remedy must be against her property. (*Socket v. Wray*, 4 Brown, 485; *Francis v. Widville*, 1 Mad. 263.)

Where her husband is banished for life, (*Countess of Portland v. Producers*, 2 Vern. 104,) or, as it seems, is transported beyond the seas, (*Newsome v. Bowyer*, 3 P. Wms. 38; *Lean v. Schutz*, 2 W. Bla. 1198,) or is an alien enemy, (*Deerly v. Duchess of Mazarine*, 1 Salk. 116; and see Co. Litt. 132 b, 133 a,) in all these cases it has been held, that it is necessary the wife should be considered as a *feme sole*.

(10) Mr. Christian says, "it seems that he has not even this exception in his favour. Harg. Co. Litt. 2."

chases (when found by an inquest of office) being immediately forfeited to the king (*n*).

Papists.

Papists, lastly, and persons professing the popish religion, and neglecting to take the oath prescribed by statute 18 Geo. III. c. 60, within the time limited for that purpose, are by statute 11 & 12 W. III. c. 4, disabled to purchase any lands, rents, or hereditaments; and all estates made to their use, or in trust for them, are void(*o*) (11).

II. As to *how* a man may aliene or convey.

II. We are next, but principally, to inquire, *how* a man may aliene or convey; which will lead us to consider the several modes of conveyance.

Origin and use of conveyances.

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In consequence of the admission of property, or the giving a separate right by the law of society to those things which by the law of nature were in common, there was necessarily some means to be devised, whereby that separate right or exclusive property should be originally acquired; *which, we have more than once observed, was that of occupancy or first possession (12). But this possession, when once gained, was also necessarily to be continued; or else, upon one man's dereliction of the thing he had seized, it would again become common, and all those mischiefs and contentions would ensue, which property was introduced to prevent. For this purpose, therefore, of continuing the possession, the municipal law has established *descents* and *alienations*: the former to continue the possession in the heirs of the proprietor, after his *involuntary* dereliction of it by his death; the latter to continue it in those persons to whom the proprietor, by his own *voluntary* act, should choose to relinquish it in his life-time. A translation, or transfer, of property being thus admitted by law, it became necessary that this transfer should be properly evidenced: in order to prevent disputes, either about the fact, as, whether there was any transfer at all: or concerning the persons,

(*n*) Co. Litt. 2.

(*o*) 1 P. Wms. 354.

(11) The act cited was rather an enabling than a disabling statute; it repealed so much of the act of Will. III. as declared papists incapable of purchasing lands, and merely imposed an oath of allegiance. As to the further

relief since given to Roman Catholic subjects, see the notes to Vol. I. pp. 230, 368, and the note to p. 257 of the present volume.

(12) See *ante*, chapter 1, and the notes thereto.

by whom and to whom it was transferred; or, with regard to the subject matter, as, what the thing transferred consisted of; or lastly, with relation to the mode and quality of the transfer, as, for what period of time (or, in other words, for what estate and interest) the conveyance was made. The legal evidences of this translation of property are called the *common assurances* of the kingdom; whereby every man's estate is assured to him, and all controversies, doubts, and difficulties are either prevented or removed.

These common assurances are of four kinds:—1. By matter *in pais*, or deed; which is an assurance transacted between two or more private persons *in pais*, in the country; that is, (according to the old common law) upon the very spot to be transferred. 2. By matter of *record*, or an assurance transacted only in the king's public courts of record. 3. By special *custom*, obtaining in some particular places, and relating only to some particular species of property. Which three are such as take effect during the life of the party conveying or assuring. 4. The fourth takes no effect till after his death; and that is by *devise*, contained in his last will and testament. We shall treat of each in its order.

The common assurances are of four kinds:—

1. By deed;

2. By matter of record;

3. By special custom;

4. By devise.

CHAPTER XX.

OF ALIENATION BY DEED.

Of deeds.

IN treating of deeds I shall consider, first, their general nature; and, next, the several sorts or kinds of deeds, with their respective incidents. And, in explaining the former, I shall examine, first, what a deed is; secondly, its requisites; and thirdly, how it may be avoided.

I. A deed is a writing sealed and delivered by the parties,

I. First, then, a deed is a writing sealed and delivered by the parties (*a*). It is sometimes called a charter, *carta*, from its materials; but most usually, when applied to the transactions of private subjects, it is called a deed, in Latin *factum*, κατ' ἐξοχὴν, because it is the most solemn and authentic act that a man can possibly perform, with relation to the disposal of his property; and therefore a man shall always be *estopped* by his own deed, or not permitted to aver or prove any thing in contradiction to what he has once so solemnly and deliberately avowed (*b*). If a deed be made by more parties than one, there ought to be regularly as many copies of it as there are parties, and each should be cut or indented (formerly in acute angles *instar dentium*, like the teeth of a saw, but at present in a waving line) on the top or side, to tally or correspond with the other; which deed, so made, is called an indenture. Formerly, when deeds were more concise than at present, it was usual to write both parts on the same piece of parchment, with some word or letters of the alphabet written between them; through which the parchment was cut, either in a straight or indented line, in such a manner as to leave half the word on

Indentures.

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*one part and half on the other. Deeds thus made were de-

(a) Co. Litt. 171.

(b) Plowd. 434.

nominated *syngrapha* by the canonists (*c*); and with us *chi-rographa*, or hand-writings (*d*); the word *cirographum* or *cyrographum* being usually that which is divided in making the indenture: and this custom is still preserved in making out the indentures of a fine, whereof hereafter. But at length indenting only has come into use, without cutting through any letters at all; and it seems at present to serve for little other purpose, than to give name to the species of the deed. When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the *original*, and the rest are *counterparts*: though of late it is most frequent for all the parties to execute every part; which renders them all originals. A deed made by one party only Deeds-poll. is not indented, but *polled* or shaved quite even; and therefore called a *deed-poll*, or a single deed (*e*).

II. We are in the next place to consider the *requisites* of a deed. The first of which is, that there be persons able to contract and be contracted with for the purposes intended by the deed: and also a thing, or subject-matter to be contracted for; all which must be expressed by sufficient names (*f*). So as in every grant there must be a grantor, a grantee, and a thing granted; in every lease a lessor, a lessee, and a thing demised.

Secondly, the deed must be founded upon good and sufficient *consideration* (1). Not upon an usurious con-

II. Of the requisites of a deed—
1. Proper parties, and a proper subject-matter.

2. A good and sufficient consideration.

(*c*) Lyndew. l. 1, t. 10, c. 1.

(*d*) Mirror, c. 2, s. 27.

(*e*) Ibid.; Litt. s. 371, 372.

(*f*) Co. Litt. 35.

(1) A consideration, (in the legal sense of that word,) it has sometimes been said, is not, for all purposes, essentially necessary to the validity of a deed. In *Sharington v. Strotton*, (1 Plowd. 308 b,) it was observed, *arguendo*, and not denied, that “because words are oftentimes spoken unadvisedly, the law has provided that a contract by words shall not bind, without a consideration. But deliberation necessarily accompanies the making and completion of deeds, for which reason they are received as a *lien final to the party*, and are ad-

judged to bind the party, without examining upon what consideration they were made. In the deed is a sufficient consideration, *viz.* the will of the party who made it.” (And see *Marquis of Normanby v. Duke of Devonshire*, 2 Freem. 216; *Pillans v. Microp*, 3 Burr. 1670, which last case, however, has been impeached; see *Tate v. Hilbert*, 2 Ves. jun. 117; *Vez v. Emery*, 5 Ves. 143; *Ran v. Hughes*, 7 T. R. 350, n. See also the two next notes.) To the same effect, our author observes in pp. 445, 446, *post*, that, although it be a general rule

tract (g) (2); nor upon fraud or collusion, either to deceive purchasers *bonâ fide* (h), or just and lawful creditors (i); any

(g) Stat. 13 Eliz. c. 8.

(h) Stat. 27 Eliz. c. 4.

(i) Stat. 13 Eliz. c. 5.

that a consideration is absolutely necessary to the forming of a contract, and that a *nudum pactum* is totally void in law, and a man cannot be compelled to perform it; yet, if he has entered into a voluntary bond, or given a promissory note, he shall not be allowed to aver the want of consideration in order to evade the payment; for, every bond, from the solemnity of the instrument, and every note, from the subscription of the drawer, carries with it an internal evidence of a good consideration. Courts of justice will, therefore, support them both, *as against the contractor himself; but not to the prejudice of creditors*. That guaranties must not only be made on good consideration in order to be binding, but that such consideration must appear on the face of the instrument, see *post*, the note to Vol. III. p. 157.

(2) Whenever a fair inference arises, either of ignorance on the one side as to the extravagant nature of the transactions, or of undue influence on the other part, no conveyances obtained from a distressed party, (whose urgent necessities render him hardly a free agent,) can be supported as more, at the utmost, than securities for any balance which may be truly due on the account between the parties. (*Wharton v. May*, 5 Ves. 70.) And though in the case just cited it was held, that *post obit* bonds were not liable to impeachment, on the ground of usury; and it is not of necessity that *post obit* bonds must be affected, merely by showing that the money might have been procured on more reasonable terms; (*Curling v. Marquis Townsend*, 19 Ves. 634;) still, such dealings are discounte-

nanced in equity, (*Earl of Chesterfield v. Jansen*, 1 Atk. 347, 353,) and, on grounds of public policy, will be very strictly examined; great inadequacy of consideration may, of itself, in such cases be sufficient to induce a court to presume oppression. (*Darley v. Singleton*, Wightwick, 29; *Crowe v. Ballard*, 1 Ves. jun. 220.)

To expectant heirs, the Court of Chancery seems to have extended a degree of protection, almost approaching to a declaration of their incapacity to bind themselves by any contract as to their expectancies. (*Peacock v. Evans*, 16 Ves. 514; *Marsack v. Reeves*, 6 Mad. 109; *Gwynne v. Heaton*, 1 Browne, 9.) And although a sale by an expectant heir of a reversion (which is as much property as an estate in possession) may be supported if the transaction was a fair one: (*Shelley v. Nash*, 3 Mad. 236; *Headen v. Rosher*, M'Clel. & Younge, 91:) yet, if the particulars of a sale by auction disclose that the vendor is a young man about to raise money on *post obit* bonds, and that the sale is to take place without a reserve of any bidding on the part of the vendor, the purchaser will have great difficulty, at all events, in supporting the transaction. (*Fox v. Wright*, 6 Mad. 112.) It has been doubted, (in *Wood v. Abrey*, 3 Mad. 422,) whether the principle was sound, according to which the purchasers of vested reversions have been compelled to prove the fairness of the price they paid, or to reconvey the property purchased: this rule, however, seems to be established by a series of decisions. (*Gowland v. De Faria*, 17 Ves. 24.) *A fortiori*, where a person has dealt with an heir apparent for interests not

of which bad considerations will vacate the deed, and subject such persons, as put the same in ure, to forfeitures, and often to imprisonment. A deed also, or other grant, made without any consideration, is, as it were, of no effect; for it is construed to inure, or to be effectual, only to the use of the grantor himself (*k*) (3). The consideration may be either

(*k*) Perk. s. 533.

vested, but constituting a bare expectancy, it does not rest with the heir to show that the bargain was unreasonable; but the *onus* lies on the other party to show that it was reasonable. (*Davis v. The Duke of Marlborough*, 2 Swanst. 139; and see 1 Hovenden on Frauds, chap. 14.)

When an annuity is set aside upon equitable grounds, it is obviously just that the applicant should return the consideration he actually received for the grant. (*Aguilar v. Aguilar*, 5 Mad. 416; *Low v. Barchard*, 8 Ves. 136; *Shove v. Webb*, 1 T. R. 735; *Scarfield v. Gowland*, 6 East, 241; and see the additions to Mr. Christian's next note.) But, in the case of *Roberts v. Goff*, (4 Barn. & Ald. 92,) a rule was granted, calling upon the plaintiff to show cause why the judgment entered upon a warrant of attorney, and the execution thereof, should not be set aside, and the warrant of attorney be delivered up to be cancelled, on the ground of *usury*. The plaintiff showed for cause, that, even if the court were satisfied of the usury, they could not set aside the judgment and direct the security to be cancelled, except upon the terms that the party should repay the money actually advanced with legal interest. But the Judges, Bailey, Holroyd, and Best, said, "we cannot impose such terms; the instrument is void: it is not good at law: the construction and practice of this court have been different from that suggested."

And to the generality of the *dictum* in the *Duke of Bolton v. Williams*,

(2 Ves. jun. 144,) that courts of equity consider the holder of an usurious instrument as a creditor for the sum actually advanced by, and fairly due to him, an exception must be made in cases where the creditor becomes bankrupt; there, the security (if not a negotiable one, and actually in the hands of an indorsee for valuable consideration without notice,) is cut down altogether. (*Ex parte Skip*, 2 Ves. sen. 489; *Benfield v. Solomons*, 9 Ves. 84; *Ex parte Scrivener*, 3 Ves. & Bea. 14.) But the statute of 58 Geo. III. c. 93, in order to afford relief to *bond fide* holders of negotiable securities, who took them without notice that they were tainted with usury, enacts, that, in such hands, the securities shall not be void.

(3) Mr. Christian, in his note upon the text, says, "this I conceive is only true of a bargain and sale; for 'herein it is said to differ from a gift, that this may be without any consideration or cause at all; and that hath always some meritorious cause moving it, and cannot be without it.' Shep. Touch. 221. But otherwise a voluntary conveyance is good both in law and equity. Tr. of Eq. b. 1, c. 5, s. 2."

[A court of equity will not annul donations—and the principle applies *a fortiori* to bargains—merely because they are improvident, and such as a wise man would not have made, or a man of nice honour would not have accepted; (*Huguenin v. Baseley*, 14 Ves. 290; *Fox v. Mackreth*, 2 Br. 420;) but, whilst disclaiming such a

a *good* or a *valuable* one. A good consideration is such as that of blood, or of natural love and affection, when a man

jurisdiction, the court will look upon such transactions with a jealous eye; and if it see the smallest speck of imposition, the least *scintilla* of fraud, will interpose. (*Gartside v. Isherwood*, 1 Br. 560; *Goddard v. Carlisle*, 9 Price, 183; *Turner v. Harvey*, Jacob's Rep. 178.) In all cases where the gift is immoderate, and bears no proportion to the circumstances of the giver; *ubi modus non adhibetur, ubi non refertur ad facultates*; and the giver is a weak man, liable to be imposed upon; a court of equity will strictly examine the conduct of the persons in whose favour such gift is made; and if the court see that any arts or stratagems, or any undue means whatever, have been used to procure the gift, it will and ought to interpose. (*Bridgman v. Green*, Wilmot's Notes, 61; *White v. Small*, 2 Cha. Ca. 103; *Aylward v. Kearney*, 2 Ball & Beat. 472; *Montesquieu v. Sandys*, 18 Ves. 313; *Wood v. Downes*, 18 Ves. 127; *Hylton v. Morgan*, 2 Ves. sen. 550.)

[Of course, where, in Lord Hardwicke's language, (in *Chesterfield v. Janson*, 2 Ves. sen. 155,) "fraud is apparent from the intrinsic nature and subject of the transaction," equity will not hesitate to rescind it: even habits of intoxication, though not carried to an excess amounting to absolute incapacity, may lay a ground for strict examination, whether an instrument executed by a party so open to imposition, does not, in itself, contain evidence that advantage was taken of those habits: (*Say v. Barwick*, 1 Ves. & Bea. 199; *Cook v. Clayworth*, 18 Ves. 16; *Dunnage v. White*, 1 Swanst. 150; *Mountain v. Bennet*, 1 Cox, 353:) and where a man entitled to an estate under his father's will, subject to a *proviso*, that if he sold it within twenty-five years,

half the purchase money should go to his brother, agreed within that time to sell it, and afterwards pleaded intoxication as a ground for refusing to execute the agreement, Lord Hardwicke relieved him, because the contract was palpably unreasonable; as the vendor was, in effect, parting with his patrimony for one half its value, even supposing the purchaser had agreed to pay its full worth. (*Faine v. Faine*, cited in 2 Ves. sen. 307; *Revell v. Hussey*, 2 Ball & Beat. 287.)

[And though the pecuniary consideration for family arrangements with respect to property will not be rigidly scrutinized; (*Nunn v. Wilsmore*, 8 T. R. 529; *Davey v. Bayntan*, 6 East, 273; *Copis v. Middleton*, 2 Mad. 430;) but it will be borne in mind that there may be other considerations, besides mere pecuniary ones, which may make such arrangements conducive to the best interests of all parties: (*Stapilton v. Stapilton*, 1 Atk. 9; *Myddleton v. Lord Kenyon*, 2 Ves. jun. 410; *Tweddell v. Tweddell*, 1 Turn. & Russ. 13; *Froysel v. Llewellyn*, 9 Price, 123;) still, satisfactory evidence will be required to show that there has been no undue influence, or fraud, in the case; (*Hotchkis v. Dickson*, 2 Bligh, 348; *Carpenter v. Herriot*, 1 Eden, 340; *Gordon v. Gordon*, 3 Swanst. 463;) and it will be thought (to speak of it in the mildest terms) a suspicious and doubtful transaction, if an uncle obtain from a nephew any gift or advantage, upon an inducement held out to the nephew, that, to consent to it, will, ultimately, be for his benefit, but without any security for the performance of such engagement, or any provision against the caprice or change of opinion of the uncle: such a transaction, if unsupported by other circumstances, cannot stand. (*Dawson v. Massey*, 1 Ball & Beat. 235.)

grants an estate to a near relation, being founded on motives of generosity, prudence, and natural duty; a valuable

[However, to justify the peculiar interference of equity in annulling a deed or agreement, there must be some *substantial* ground for supposing fraud stated and proved; the old age of the party alone will not justify a presumption that he was imposed upon; (*Lewis v. Pead*, 1 Ves. jun. 19;) though that circumstance may be of some weight in estimating the fairness of the transaction. (*Griffiths v. Roberts*, 3 Mad. 192.)—ED.]

Mr. Christian adds, "it has been decided, that a voluntary settlement of lands made in consideration of natural love and affection, even as a provision for the nearest relations, parents, or children, is void as against a subsequent purchaser for a valuable consideration, although such purchaser had notice of the prior settlement. (9 East, 59.)"

[The statute of 27 Eliz. c. 4, enacts, that all conveyances of real estate made with intent to deceive or defraud *purchasers* shall be void: and in the construction of this act it is now firmly held, that every voluntary conveyance is fraudulent as against a subsequent purchaser for valuable consideration. (*Buckle v. Mitchell*, 18 Ves. 110; *Metcalfe v. Pulvertoft*, 1 Ves. & Bea. 183.) And a court of equity, it has been said, will not enter into the adequacy of the consideration paid by the purchaser, (*Bullock v. Sadler*, Ambl. 766,) unless it be so small as to be palpably fraudulent: (*Upton v. Basset*, Cro. Eliz. 445; *Metcalfe v. Pulvertoft*, 1 Ves. & Bea. 184; *The Sadlers' Company v. Badcock*, 2 Atk. 555; *Sculthorp v. Burgess*, 1 Ves. jun. 92;) though, if an estate has been collusively sold for a third part of its value, such a merely colourable transaction will not avail, either at law or in equity, to set aside a previous voluntary settlement. (*Doe v. Routledge*,

Cowp. 712; *Matthews v. Feaver*, 1 Cox, 280; *Metcalfe v. Pulvertoft*, 1 Ves. & Bea. 784.) In such a case, there would be only one voluntary deed against another, and the first must prevail; the illusory consideration by which it was attempted to bolster up the latter, so far from aiding it, would only be a badge of fraud and stratagem, which could entitle it to no favour. But, where the purchase is not merely colourable, the statute, according to the construction established by repeated decisions, says, that a purchaser who has notice of a voluntary settlement, has notice, not of a title, but of a nullity and a fraud. The purchaser, to be sure, cannot in such case be said to have been deceived; but the vice of the transaction is, that the voluntary conveyance (if at all maintainable) *might* have enabled the vendor to defraud a purchaser; the policy of the law therefore says, every such conveyance shall, as against purchasers for good consideration, be taken to have been made with a view to defraud. (*Buckle v. Mitchell*, 18 Ves. 110.)

[However, if the grantor of a voluntary settlement seek to get rid of it by a sale of the settled estate, and enter into a contract for that purpose, a court of equity will not enforce the specific performance of the agreement for sale at *his* suit; (*Smith v. Garland*, 2 Meriv. 123;) though it will decree such performance at the suit of the party who has contracted for the purchase. (*Johnson v. Legard*, 1 Turn. & Russ. 264.)

[If a conveyance made for the purpose of giving the grantee a colourable qualification of any kind—(as, for instance, to kill game,) was intended to be retained by the grantor, but the grantee, by a false pretence, gets possession of it; a court of equity will

consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant (*l*): and

(*l*) 3 Rep. 83.

neither restrain him from making use of the deed at law, nor, it seems, the heir of the grantor from setting up an outstanding term to defeat the grant: as against the grantor himself, who executed such a deed in order to enable a fraudulent exhibition to be made of it, if in his life-time the grantee obtained possession of the deed, no countenance from equity could be claimed by a grantor who had lent himself to a purpose contrary to the policy of the law; and he, possibly, might be restrained from setting up an outstanding term to defeat an ejectment brought against him. (*Brackenbury v. Brackenbury*, 1 Jac. & Walk. 394.) If a deed be *complete*, although only designed to give a colourable qualification, the party executing it cannot be heard to allege his own fraudulent purpose; he is estopped from confining the operation of his deed within the limits of his intended fraud. (*Cecil v. Butcher*, 2 Jac. & Walk. 572; *Birch v. Blagrove*, Ambl. 266; *Curtis v. Perry*, 6 Ves. 747; *Wildbore v. Parker*, Moseley, 125.) But, where a colourable qualification was given to enable a person to sit in parliament, who never afterwards became a candidate; as no fraud was actually committed upon the law, or against public policy, the grantee was restrained from suing upon the deed; (*Platamore v. Staple*, Coop. 253;) it having also been executed for a particular purpose which never took effect. (*Roberts v. Roberts*, 2 Barn. & Ald. 369; *Stratford v. Powell*, 1 Ball & Beat. 21.) The great question in such cases is,—has the transaction been completed? (*Cecil v. Butcher*, 2 Jac. & Walk. 574.) For, although a deed be voluntary, and retained in the maker's own custody, yet, if it be once per-

fectured, and it was not prepared for a particular purpose, *which purpose fails*, it cannot be revoked at the maker's pleasure. (*Worrall v. Jacob*, 3 Meriv. 271; *Sear v. Ashwell*, 3 Swanst. 411; *Bolton v. Bolton*, 3 Swanst. 414; *Doe v. Knight*, 5 Barn. & Cress. 691; 8 D. & R. 363, S. C.; *Barlow v. Heeneage*, Prec. in Chan. 211; *Clavering v. Clavering*, 1 Vern. 476; *Boughton v. Boughton*, 1 Atk. 625.) On the other hand, where a voluntary deed has been prepared, in contemplation of a future occasion to produce it, for a special purpose for which it was never required to be used; and when it has also been kept in the hands of the grantor, without ever being acted upon, (*Antrobus v. Smith*, 12 Ves. 45,) a court of equity will not call such grant into operation: the utmost it will do will be to retain a bill brought for that purpose, with liberty for the plaintiff to bring an action: and where this was permitted, it may be inferred, that, if he were to succeed at law, he would not be restrained by equity from proceeding to obtain the fruits of such judgment: though that point has never, it is believed, yet called for decision. (*Cecil v. Butcher*, 2 Jac. & Walk. 578.)

[A deed, undoubtedly, may have been executed solely in contemplation of a particular purpose, which fails to take effect, yet that circumstance may not be sufficient to prevent the operation of the instrument. For instance, if a man convey the whole of his estate in trust for certain uses until his marriage, and then die before marriage, any previous testamentary disposition made by such conveying party would certainly be revoked; and it should seem his heir at law could not successfully contend, that, for other purposes, the instrument was inoffici-

is therefore founded in motives of justice. Deeds made upon good consideration only, are considered as merely vo-

ous, supposing the uses thereby declared went to exclude him: if they were in his favour, his title would be good *quâcunque viâ*. (*Earl of Lincoln v. Roll*, Show. P. C. 155.)

[If a deed be, in fact, obtained without consideration, but a good consideration is therein expressed, the forms of proceeding in courts of common law do not admit such an investigation of the subject as will enable those courts to do justice; for it is to be understood as a general proposition, (qualified with some exceptions, *Collins v. Blantern*, 2 Wils. 348, 351; *Kerrison v. Cole*, 8 East, 236; *Ex parte Bulmer*, 13 Ves. 318; *Byne v. Vivian*, 5 Ves. 606,) that the common law will not allow averments of matter *dehors* a deed, to modify it to a certain extent; though equity not only permits an alleged consideration to be disproved by evidence *dehors*, but regulates the extent of relief given according to the circumstances of the case: whereas a court of law must, as a general rule, either entirely establish, or altogether nullify the deed: (*Watt v. Grove*, 2 Sch. & Lef. 501:) an exception must be made as to *annuity deeds*; if these are defective, under the 4th sec. of the annuity act of 53 Geo. III. c. 141, courts of common law have a discretionary power to impose terms, upon which alone the deeds will be set aside. (*Barber v. Gainson*, 4 Barn. & Ald. 286; *Gorton v. Champneys*, 1 Bingh. 301; 8 Moore, 302, S. C.; *Girdlestone v. Allan*, 1 Barn. & Cress. 64; 2 D. & R. 150, S. C.; and see the last note.)

[It is to be observed, that, although a deed may, in equity, be impeached by averments negating the consideration therein expressed, yet, it seems, notwithstanding what was said in *Bedel's case*, (7 Rep. 133,) the

converse does not hold. A deed cannot be supported by evidence of considerations different from those alleged in it: (*Watt v. Grove*, 2 Sch. & Lef. 501; *Clarkson v. Hanway*, 2 P. Wms. 204:) still, notwithstanding the *recital* of a deed may imply nothing but a sale for a pecuniary consideration, yet, if the words "natural love and affection" be afterwards thrown into the *body of the deed*, and the parties are in fact related, this consideration, so introduced, will be sufficient to support the conveyance, and to repel any *primâ facie* suspicions of fraud practised against the vendor, grounded on inadequacy of price; (*Whalley v. Whalley*, 1 Meriv. 446; *Filmer v. Gott*, 7 Br. P. C. 70, fol. edit.;) provided it can be satisfactorily shown that love and affection did really make a part of the consideration for the conveyance. But the case would be different if it appeared, that until the bill was filed to set aside the transaction, the defendant never thought of the consideration of love and affection, but always deemed himself, and professed to be, a mere purchaser; and the presumption against him would be still stronger, if the consideration of blood was not set up by his answer, but was an after thought, suggested by the ingenuity of counsel at the hearing. (*Whalley v. Whalley*, 3 Bligh, 13, 15.)—ED.]

Mr. Christian further adds, "if a person is indebted at the time of making a voluntary grant, or becomes so soon afterwards, it will be considered fraudulent and void with respect to creditors, under the 13 Eliz. c. 5."

[The statute of 13 Eliz. c. 5, declares all gifts, conveyances, and alienations of real or personal estates, whereby *creditors* may be delayed or defrauded, void as against such creditors: but, judicial interpretation has determined,

luntary, and are frequently set aside in favour of creditors, and *bonâ fide* purchasers.

that creditors whose demands were existing at the time of the transaction are alone intended by the statute ; and that a voluntary conveyance, or a settlement made *after marriage*, (which is considered voluntary, see *infra*,) will be maintained against subsequent creditors, provided the settlor was not indebted at the time he made such settlement, and was not a trader within the purview of the bankrupt laws. (*Glaister v. Hewer*, 8 Ves. 200 ; *Battersbee v. Farrington*, 1 Swanst. 113 ; *Holloway v. Millard*, 1 Mad. 419 ; *Johnson v. Legard*, Turn. & Russ. 293.) This general rule, however, must be qualified so as to exclude cases of fraud. It is not necessary that a man should be actually indebted at the time he enters into a voluntary settlement, in order to stamp it with fraud ; if he make such settlement with a view to his becoming indebted, or engaging in trade, it is equally fraudulent, and ought to be set aside. (*Stileman v. Ashdown*, 2 Atk. 480 ; *Taylor v. Jones*, 2 Atk. 602 ; *Higinbotham v. Holme*, 19 Ves. 92.)

[To induce a court of equity to set aside a settlement as being fraudulent under the 13 Eliz., the complaint must be made by a creditor, who has put himself into a situation entitling him to apply for the aid of the court, by having obtained judgment for his debt, and showing, that by the settlement he is defrauded of the fruits of his judgment ; (*Colman v. Croker*, 1 Ves. jun. 161 ;) for, a voluntary settlement is void under this statute only as against creditors ; to the extent in which it may be necessary to deal with the estate settled for their satisfaction, the settlement is null ; satisfy the creditors and the settlement stands. (*Curtis v. Price*, 12 Ves. 103 ; *Rand v. Cartwright*, 2 Freem. 183 ; *Ex parte Bell*, 1 Glyn & Jameson, 284.)

[The statutes of 13 Eliz. c. 5, and of 27 Eliz. c. 4, are both directed to the same general end,—the prevention of fraud : the great distinction between them is, that the former is specially designed for the relief of *creditors*, the latter for the relief of *purchasers*. But that difference goes no further than this,—by the 27th Eliz. *every* voluntary conveyance is rendered void by a subsequent *purchase* for valuable consideration ; whilst under the 13th Eliz. a voluntary conveyance by one not indebted at the time, (more especially if for a child of the grantor,) if no particular evidence or badge of fraud appears, will be good as against subsequent *creditors*. (*Townsend v. Windham*, 2 Ves. sen. 11.) When the transaction is a private one between the parties themselves, and not executed in pursuance of antenuptial articles, (*Hylton v. Biscoe*, 2 Ves. sen. 308,) no post-nuptial settlement can be sustained as against *purchasers* ; for the contract of marriage being completed, supplies no valuable consideration ; (*Beaumont v. Thorp*, 1 Ves. sen. 27 ; *Randall v. Morgan*, 12 Ves. 73 ;) but the 13th Eliz., as we have seen, does not make *all* voluntary settlements or conveyances void as against *creditors* ; but merely declares *fraudulent* settlements void against their claims. (*Russel v. Hammond*, 1 Atk. 15 ; *Jones v. Boulter*, 1 Cox, 294 ; *Chamley v. Lord Dunsaney*, 2 Sch. & Lef. 714 ; *Hobbs v. Hull*, 1 Cox, 446.) A post-nuptial settlement, or conveyance altogether voluntary, made by a person not indebted at the time, it has already been stated, is good against future creditors ; and the trifling debts which every housekeeper, however regular in his accounts, must necessarily have, will not raise a presumption of fraud ; *that* must depend upon the fact

Thirdly, the deed must be *written*, or I presume *printed*,^{3. Writing on paper or parchment, duly stamped.} for it may be in any character or any language ; but it must be upon paper or parchment. For if it be written on stone, board, linen, leather, or the like, it is no deed (*m*). Wood or stone may be more durable, and linen less liable to rasures ; but writing on paper or parchment unites in itself, more perfectly than any other way, both those desirable qualities : for there is nothing else so durable, and at the same time so little liable to alteration ; nothing so secure from alteration, that is at the same time so durable. It must also have the regular stamps imposed on it by the several statutes for the increase of the public revenue ; else it cannot be given in evidence. Formerly, many conveyances were made by parol, or word of mouth only, without writing ; but this giving a handle to a variety of frauds, the statute 29 Car. II. c. 3 (4), enacts, that no lease, estate or in-

(*m*) Co. Litt. 229 ; F. N. B. 122.

whether he was, or was not, then in insolvent circumstances. (*Lush v. Wilkinson*, 5 Ves. 387.)—ED.]

Mr. Christian proceeds, “ And if a person makes a voluntary grant, and afterwards becomes bankrupt, whether he was indebted or not at the time, it will be void by 1 Jac. I. c. 15 ; and the estate granted may be conveyed by the commissioners to the assignees for the benefit of the creditors. 1 Atk. 93.”

[See *ante*, p. 286, note. Although a voluntary settlement by a trader who becomes bankrupt, is void even against creditors who became such subsequently to the settlement ; still, if any surplus of the bankrupt's estate remain after payment of all his creditors, that surplus will be bound by the trusts of the settlement. (*Ex parte Bell*, 1 Glyn & Jameson, 284 ; *Assignees of Gardiner v. Shannon*, 2 Sch. & Lef. 228 ; and see *Rand v. Cartwright*, 2 Freem. 183.)—ED.]

(4) Courts of equity, though the practice has been lamented, have long been in the habit of deciding, upon

equitable grounds, in contradiction to this positive enactment. The earliest case of the kind appears to have been that of *Foxcraft v. Lyster*. (Colles' P. C. 108.) By the highest tribunal of the realm, it was held to be against conscience to suffer a party who had entered into lands, and expended his money, on the faith of a parol agreement, to be treated as a trespasser ; and for the other party, in fraud of his engagement, (although that was only verbal,) to enjoy the advantage of the money so laid out. This determination, though in the teeth of the act of parliament, was clearly founded on sound abstract principles of natural justice ; and confirmed as it has been by an almost daily succession of analogous authorities, it is not now to be questioned.

It is settled also, that trusts of lands arising by implication, or operation of law, are not within the statute of frauds ; if they were, it has been said, that statute would tend to promote frauds rather than prevent them. (*Young v. Peachy*, 2 Atk. 256, 257 ;

terest in lands, tenements, or hereditaments, made by livery of seisin, or by parol only, (except leases, not exceeding three years from the making, and whereon the reserved rent is at least two-thirds of the real value,) shall be looked upon as of greater force than a lease or estate at will; nor shall any assignment, grant, or surrender of any interest in any freehold hereditaments be valid; unless in both cases the same be put in writing, and signed by the party granting, or his agent lawfully authorised in writing.

4. Sufficient
and legal words
properly dis-
posed:

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Fourthly, the matter written must be *legally* and *orderly* set forth: that is, there must be words sufficient to specify the agreement and bind the parties; which *sufficiency must be left to the courts of law to determine (*n*). For it is not absolutely necessary in law, to have all the formal parts that are usually drawn out in deeds, so as there be sufficient words to declare clearly and legally the party's meaning. But, as these formal and orderly parts are calculated to convey that meaning in the clearest, distinctest, and most effectual manner, and have been well considered and settled by the wisdom of successive ages, it is prudent not to depart from them without good reason or urgent necessity; and therefore I will here mention them in their usual (*o*) order.

(*n*) Co. Litt. 225.

(*o*) Ibid. 6.

Willis v. Willis, 2 Atk. 71; *Anonym.* 2 Ventr. 361.)

The statute of frauds enacts, that no agreement respecting lands shall be of force, unless it be signed *by the party to be charged*; but the statute does not say that every agreement so signed shall be enforced. To adopt that construction would be, to enable any person who had procured another to sign an agreement, to make it depend on his own will and pleasure whether it should be an agreement or not. Lord Redesdale, indeed, has intimated a doubt, whether in any case (not turning upon the fact of part performance) an agreement ought to be enforced, which has not been signed by, or on behalf of, both parties;

(*Lawrenson v. Butler*, 1 Sch. & Lef. 20; *O'Rourke v. Percival*, 2 Ball & Beat. 62;) Lord Hardwicke and Sir Wm. Grant held a different doctrine; (*Backhouse v. Mohun*, 3 Swanst. 435; *Fowle v. Freeman*, 9 Ves. 354; *Western v. Russel*, 3 Ves. & Bea. 192;) Lord Eldon, without expressly deciding the point, seems to have leaned to Lord Redesdale's view of the question; (*Huddleston v. Biscoe*, 11 Ves. 592;) and Sir Thomas Plumer wished it to be considered whether, when one party has not bound himself, the other is not at liberty to enter into a new agreement with a third person. (*Martin v. Mitchell*, 2 Jac. & Walk. 428.)

1. The *premises* may be used to set forth the number and ^{premises;} names of the parties, with their additions or titles. They also contain the recital, if any, of such deeds, agreements, or matters of fact, as are necessary to explain the reasons upon which the present transaction is founded; and herein also is set down the consideration upon which the deed is made. And then follows the certainty of the grantor, grantee, and thing granted (*p*).

2, 3. Next come the *habendum* and *tenendum* (*q*). The ^{*habendum* and *tenendum*;} office of the *habendum* is properly to determine what estate or interest is granted by the deed: though this may be performed, and sometimes is performed, in the premises. In which case the *habendum* may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to the estate granted in the premises. As, if a grant be "to A. and "the heirs of his body," in the premises, *habendum* "to "him and his heirs for ever," or *vice versâ*; here A. has an estate-tail, and a fee-simple expectant thereon (*r*). But, had it been in the premises "to him and his heirs," *habendum* "to him for life," the *habendum* would be utterly void (*s*); for an estate of inheritance is vested in him before the *habendum* comes, and shall not afterwards be taken away or divested by it. The *tenendum*, "and to hold," is now of very little use, and is only kept in by custom. It was sometimes formerly *used to signify the tenure by which the estate granted was to be holden; *viz.* "*tenendum per servitium militare, in burgagio, in libero socagio, &c.*" But, all these being now reduced to free and common socage, the tenure is never specified. Before the statute of *quia emptores*, 18 Edw. I., it was also sometimes used to denote the lord of whom the land should be holden: but that statute directing all future purchasers to hold, not of the immediate grantor, but of the chief lord of the fee, this use of the *tenendum* hath been also antiquated; though for a long time after we find it mentioned in ancient charters, that the tenements shall be holden *de capitalibus dominis feodi* (*t*); but as this expressed nothing more than the statute had already provided for, it gradually grew out of use. [* 299]

(*p*) See Appendix, No. II. s. 2, 23; Cro. Jac. 476.
pag. v.

(*s*) 2 Rep. 23; 8 Rep. 56.

(*q*) Ibid.

(*t*) Appendix, No. I. Madox. For.

(*r*) Co. Litt. 21; 2 Roll. Rep. 19, mul. *passim*.

reddendum;

4. Next follow the terms of stipulation, if any, upon which the grant is made: the first of which is the *reddendum* or reservation, whereby the grantor doth create or reserve some new thing to himself out of what he had before granted, as “rendering therefore yearly the sum of ten shillings, or a “pepper corn, or two days’ ploughing, or the like (*u*).” Under the pure feudal system, this render, *reditus*, return, or rent, consisted in chivalry principally of military services; in villenage, of the most slavish offices; and in socage, it usually consists of money, though it may still consist of services, or of any other certain profit (*w*). To make a *reddendum* good, if it be of any thing newly created by the deed, the reservation must be to the grantors, or some, or one of them, and not to any stranger to the deed (*x*). But if it be of ancient services or the like, annexed to the land, then the reservation may be to the lord of the fee (*y*).

condition;

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5. Another of the terms upon which a grant may be made is a *condition*; which is a clause of contingency, on the happening of which the estate granted may be defeated (5); as “provided always, that if the mortgagor shall pay the mortgagee *500*l.* upon such a day, the whole estate granted “shall determine;” and the like (*z*).

warranty;

6. Next may follow the clause of *warranty*; whereby the grantor doth, for himself and his heirs, warrant and secure to the grantee the estate so granted (*a*). By the feudal constitution, if the vassal’s title to enjoy the feud was disputed, he might vouch, or call the lord or donor, to warrant or insure his gift; which if he failed to do, and the vassal was evicted, the lord was bound to give him another feud of equal value in recompence (*b*). And so, by our ancient law, if before the statute of *quia emptores* a man enfeoffed another in fee, by the feudal verb *dedi*, to hold of himself and his heirs by certain services; the law annexed a warranty (6) to this grant, which bound the feoffor and his heirs, to whom the services (which were the consideration and equivalent for

(u) Appendix, No. II. s. 1, pag. iii.

(z) Appendix, No. II. s. 2, pag. viii.

(w) See pag. 41.

(a) Ibid. No. I. pag. i.

(x) Plowd. 13; 8 Rep. 71.

(b) Feud. l. 2, t. 8 & 25.

(y) Appendix, No. I. pag. i.

(5) See *ante*, chapter 10, pp. 152—162, and the notes thereto.(6) See *ante*, p. 53, note.

the gift) were originally stipulated to be rendered (c). Or if a man and his ancestors had immemorially holden land of another and his ancestors by the service of homage, (which was called *homage auncestrel*;) this also bound the lord to warranty (d); the homage being an evidence of such a feodal grant. And, upon a similar principle, in case, after a partition (7) or exchange of lands of inheritance, either party or his heirs be evicted of his share, the other and his heirs are bound to warranty (e), because they enjoy the equivalent. And so, even at this day, upon a gift in tail or lease for life, rendering rent, the donor or lessor and his heirs (to whom the rent is payable) are bound to warrant the title (f). But, in a feoffment in fee, by the verb *dedi*, since the statute of *quia emptores*, the feoffor only is bound to the implied warranty, and not his heirs (g); because it is a mere personal contract on the part of the feoffor, the tenure (and of course the ancient services) resulting back to the superior

(c) Co. Litt. 384.

(d) Litt. s. 143.

(e) Co. Litt. 174.

(f) Co. Litt. 384.

(g) Ibid.

(7) See *ante*, p. 185, note, and the *corrigenda et addenda* prefixed to this volume, as to the course of proceedings for effecting a partition. Every partition *between coparceners* has annexed to it a warranty in law; (1 Instit. 173 b;) though, in other deeds of partition, it seems there is no implied warranty, and therefore mutual covenants for title ought never to be omitted therein. But in every exchange, both a condition and a warranty are tacitly implied; a condition of re-entry, and a warranty of voucher and recompence. Such warranty, however, is special; and upon voucher by force of it, a man shall not recover other land in value, but that only which was given by him in exchange. And this warranty implied by law runs only in privity; for none shall vouch by force of it but the parties to the exchange or their heirs, and no assignee. (*Bustard's case*, 4 Rep. 121; *Provost of Eton v. Bishop of Winches-*

ter, 3 Wils. 490, 496.)

The transactions of partition, and of exchange approximate to each other, and have some things in common, but they have many points of difference: the rule as to warranty, we have seen, is not precisely the same in both cases: on a partition, each party has what was previously his own land, though he acquires a different interest in it; on an exchange, the land to which each party had previous title is parted with, and new lands acquired: a partition may be enforced, an exchange is always a voluntary act: a mere partition does not revoke a previous devise of the undivided interest, an exchange always operates a revocation; or rather a will made before the exchange cannot dispose of the land received in exchange. (*Attorney General v. Hamilton*, 1 Mad. 223; *M'Queen v. Farquhar*, 11 Ves. 476; *Attorney General v. Vigor*, 8 Ves. 281.)

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lord of the fee. And in other forms of alienation, gradually introduced since that statute, *no warranty whatsoever is implied (*h*); they bearing no sort of analogy to the original feudal donation. And therefore in such cases it became necessary to add an express clause of warranty to bind the grantor and his heirs; which is a kind of covenant real, and can only be created by the verb *warrantizo* or *warrant* (*i*).

Effect of the
clause of war-
ranty in a con-
veyance.

These express warranties were introduced, even prior to the statute of *quia emptores*, in order to evade the strictness of the feudal doctrine of non-alienation without the consent of the heir. For, though he, at the death of his ancestor, might have entered on any tenements that were aliened without his concurrence, yet if a clause of warranty was added to the ancestor's grant, this covenant descending upon the heir insured the grantee; not so much by confirming his title, as by obliging such heir to yield him a recompence in lands of equal value: the law, in favour of alienations, supposing that no ancestor would wantonly disinherit his next of blood (*h*); and therefore presuming that he had received a valuable consideration, either in land, or in money which had purchased land, and that this equivalent descended to the heir together with the ancestor's warranty. So that when either an ancestor, being the rightful tenant of the freehold, conveyed the land to a stranger and his heirs, or released the right in fee-simple to one who was already in possession, and superadded a warranty to his deed, it was held that such warranty not only bound the warrantor himself to protect and assure the title of the warrantee, but it also bound his heir: and this, whether that warranty was *lineal* or *collateral* to the title of the land. *Lineal* warranty was, where the heir derived, or might by possibility have derived, his title to the land warranted, either from or through the ancestor who made the warranty: as where a father or an elder son in the life of the father, released to the disseisor of either themselves or the grandfather, with warranty, this was lineal to the younger son (*l*). *Collateral* warranty was where the heir's title to the land neither was,

Lineal war-
ranty.

Collateral war-
ranty.

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nor could have been, derived from the *warranting ances-

(*h*) Co. Litt. 102.

(*i*) Litt. s. 733.

(*h*) Co. Litt. 373.

(*l*) Litt. s. 703, 706, 707.

tor (8); as where a younger brother released to his father's disseisor, with warranty, this was collateral to the elder brother (*m*). But where the very conveyance to which the warranty was annexed immediately followed a disseisin, or operated itself as such, (as, where a father tenant for years with remainder to his son in fee, aliened in fee-simple with warranty,) this, being in its original manifestly founded on the *tort* or wrong of the warrantor himself, was called a warranty, *commencing by disseisin*; and being too palpably injurious to be supported, was not binding upon any heir of such tortious warrantor (*n*).

In both lineal and collateral warranty, the obligation of the heir (in case the warrantee was evicted, to yield him other lands in their stead) was only on condition that he had other sufficient lands by descent from the warranting ancestor (*o*). But though without assets, he was not bound

Obligation of
the warranty
on the heir.

(*m*) Litt. s. 705, 707.

(*n*) Ibid. s. 698, 702.

(*o*) Co. Litt. 102.

(8) The whole doctrine of collateral warranty seems repugnant to plain unsophisticated reason and justice; and even its technical grounds are so obscure, that the ablest legal writers are not agreed upon the subject. Sir Martin Wright, (in his *Law of Tenures*, 168,) gives the following account of the matter. "A tenant could not, either by the feudal or common law, alien a fee that was not of his own acquisition, that is to say, a fee that was not originally conferred upon himself, but that came to him by descent, without the consent of the heir, *qui proximus erat in successione collateralis*; for, though the law trusted an ancestor with the interest of his *own immediate* descendants, yet, he could not prejudice the next *collateral*, who having a distinct, though remote interest in the feudal donation, could not be deprived of it but by an act of his own. This manifestly hints the foundation, and partly suggests the reason, of collateral warranty; though it is not easy to be conceived how it came to pass, that the concurrence or sim-

ple consent of the next collateral, which was requisite to defeat his own hopes of succession, should swell up into a mean to defeat even estates to which such collateral could have no possible hopes of succeeding."

Chief Baron Gilbert, (in his *Treat. of Tenures*, 143,) endeavours to account for the doctrine of collateral warranty in a different manner. He thinks it was introduced for the purpose of quieting (what in the *good old times* were very frequent) disseisins. That it was found easier to compromise with an ancestor who had lost nothing, than with a party to whom the wrong was actually done; and if the disseisor purchased a warranty from such ancestor, the disseisee was either bound by the warranty, or compelled to renounce his expectations from the relation who gave it.

Since this note was first published, it has been enacted by stat. 3 & 4 Gul. IV. c. 74, s. 14, that estates tail, and estates expectant thereon, shall no longer be barrable by warranty, but by simpler means.

to insure the title of *another*, yet in case of lineal warranty, whether assets descended or not, the heir was perpetually barred from claiming the land *himself*; for if he could succeed in such claim, he would then gain assets by descent, (if he had them not before,) and must fulfil the warranty of his ancestor: and the same rule (*p*) was with less justice adopted also in respect of collateral warranties, which likewise (though no assets descended) barred the heir of the warrantor from claiming the land by any collateral title; upon the presumption of law that he might hereafter have assets by descent either from or through the same ancestor. The inconvenience of this latter branch of the rule was felt very early, when tenants by the curtesy took upon them to alien their lands with warranty; which collateral warranty of the father descending upon his son (who was the heir of both his parents) barred him from claiming his maternal inheritance; to remedy which the statute of Gloucester, 6 Edw. I. c. 3, declared, that such warranty should be no bar to the son, unless assets descended from the father. It

[* 303] was afterwards attempted in 50 Edw. III. *to make the same provision universal, by enacting, that no collateral warranty should be a bar, unless where assets descended from the same ancestor (*q*); but it then proceeded not to effect. However, by the statute 11 Hen. VII. c. 20, notwithstanding any alienation with warranty by tenant in dower, the heir of the husband is not barred, though he be also heir to the wife. And by statute 4 & 5 Ann. c. 16, all warranties by any tenant for life shall be void against those in remainder or reversion; and all collateral warranties by any ancestor who has no estate of inheritance in possession, shall be void against his heir. By the wording of which last statute it should seem that the legislature meant to allow, that the collateral warranty of tenant in tail in possession, descending (though without assets) upon a remainder-man or reversioner, should still bar the remainder or reversion (9). For though the judges, in expounding the statute *de donis*, held that, by analogy to the statute of Gloucester, a lineal warranty by the tenant in tail without assets should not bar

(*p*) Litt. s. 711, 712.

(*q*) Co. Litt. 373.

(9) But see, now, the statute cited at the close of the last note.

the issue in tail, yet they held such warranty with assets to be a sufficient bar (*r*): which was therefore formerly mentioned (*s*) as one of the ways whereby an estate-tail might be destroyed; it being indeed nothing more in effect than exchanging the lands entailed for others of equal value. They also held, that collateral warranty was not within the statute *de donis*; as that act was principally intended to prevent the tenant in tail from disinheriting his own issue; and therefore collateral warranty (though without assets) was allowed to be, as at common law, a sufficient bar of the estate-tail and all remainders and reversions expectant thereon (*t*). And so it still continues to be, notwithstanding the statute of queen Anne, if made by tenant in tail in possession: who therefore may now, without the forms of a fine or recovery, in some cases make a good conveyance in fee-simple, by superadding a warranty to his grant; which, if accompanied with assets, bars his own issue, and without them bars such of his heirs as may be in remainder or reversion.

*7. After warranty usually follows *covenants* (10), or conven- Covenants.
 tions, which are clauses of agreement contained in a deed, [* 304]
 whereby either party may stipulate for the truth of certain facts, or may bind himself to perform, or give, something to the other. Thus, the grantor may covenant that he hath a right to convey; or for the grantee's quiet enjoyment; or the like; the grantee may covenant to pay his rent, or keep the premises in repair, &c. (*u*). If the covenantor covenants for himself and his *heirs*, it is then a covenant real, and descends upon the heirs, who are bound to perform it, provided they have assets by descent, but not otherwise: if he covenants also for his *executors* and *administrators*, his personal assets, as well as his real, are likewise pledged for the

(*r*) Litt. s. 712; 2 Inst. 293.

(*s*) Pag. 116.

(*t*) Co. Litt. 374; 2 Inst. 335.

(*u*) Appendix, No. II. s. 2, p. viii.

(10) A covenant, being part of a deed, is subject to the general rules for the exposition of deeds. As, first, to be always taken most strongly against the covenantor, and most in advantage of the covenantee. Secondly, to be taken according to the

intent of the parties. Thirdly, to be construed, *ut res magis valeat quam pereat*. Fourthly, when no time is limited for its performance, it must be done in reasonable time. (Shep. Touch. 166; *Griffith v. Goodhand*, T. Raym. 464.)

performance of the covenant: which makes such covenant a better security than any warranty(11). It is also in some respects a less security, and therefore more beneficial to the grantor; who usually *covenants* only for the acts of himself and his ancestors, whereas a general *warranty* extends to all mankind. For which reasons the covenant has in modern practice totally superseded the other.

Conclusion.

8. Lastly, comes the *conclusion*, which mentions the execution and date of the deed, or the time of its being given or executed, either expressly, or by reference to some day and year before mentioned(*w*). Not but a deed is good, although it mention no date: or hath a false date; or even if it hath an impossible date, as the thirtieth of February; provided the real day of its being dated or given, that is delivered, can be proved(*x*) (12).

5. Reading, if desired, before the execution.

I proceed now to the *fifth* requisite for making a good deed; the *reading* of it. This is necessary, wherever any of the parties desire it; and, if it be not done on his request, the deed is void as to him. If he can, he should read it himself: if he be blind or illiterate, another must read it to him. If it be read falsely, it will be void; at least for so much as is mis-recited; unless it be agreed by collusion that the deed shall be read false, on purpose to make it void: for in such case it shall bind the fraudulent party(*y*).

6. Sealing, and, by the statute, in many cases, signing also.

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*Sixthly, it is requisite that the party, whose deed it is, should *seal*, and now in most cases I apprehend should *sign* it also. The use of seals, as a mark of authenticity to letters and other instruments in writing, is extremely ancient. We read of it among the Jews and Persians in the earliest and

(*w*) Appendix, No. II. s 2, p. xii.

(*x*) Co. Litt. 46; Dyer, 28.

(*y*) 2 Rep. 3, 9; 11 Rep. 27. [*Bennet v. Vade*, 2 Atk. 326.]

(11) Mr. Christian observes, "the executors and administrators are bound by every covenant without being named, unless it is such a covenant as is to be performed personally by the covenantor, and there has been no breach before his death. Cro. Eliz. 553."

(12) Mr. Christian remarks, "in ancient times the date of the deed was

generally omitted, and the reason was this, *viz.* that the time of prescription frequently changed, and a deed dated before the time of prescription was not pleadable, but a deed without date might be alleged to be made within the time of prescription. Dates began to be added in the reigns of Edw. II. and Edw. III."

most sacred records of history (*z*). And in the book of Jeremiah there is a very remarkable instance, not only of an attestation by seal, but also of the other usual formalities attending a Jewish purchase (*a*). In the civil law also (*b*), seals were the evidence of truth; and were required, on the part of the witnesses at least, at the attestation of every testament. But in the times of our Saxon ancestors, they were not much in use in England. For though Sir Edward Coke (*c*) relies on an instance of king Edwin's making use of a seal about an hundred years before the conquest, yet it does not follow that this was the usage among the whole nation; and perhaps the charter he mentions may be of doubtful authority, from this very circumstance, of being sealed; since we are assured by all our ancient historians, that sealing was not then in common use. The method of the Saxons was for such as could write to subscribe their names, and, whether they could write or not, to affix the sign of the cross (13); which custom our illiterate vulgar do, for the most part, to this day keep up; by signing a cross for their mark, when unable to write their names. And indeed this inability to write, and therefore making a cross in its stead, is honestly avowed by Caedwalla, a Saxon king, at the end of one of his charters (*d*). In like manner, and for the same unsurmountable reason, the Normans, a brave but *illiterate nation, at their first settlement in France, used the practice of sealing only, without writing their names; which custom continued, when learning made its way among them, though the reason for doing it had ceased; and hence the charter of Edward the Confessor to

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(*z*) 1 Kings, c. 21; Daniel, c. 6; Esther, c. 8.

(*a*) "And I bought the field of Hameel, and weighed him the money, even seventeen shekels of silver. And I subscribed the evidence, and sealed it, and took witnesses, and weighed him the money in the balances. And I took the evidence of the purchase, both that which was sealed according to the law and custom, and also that which was

open." c. 32.

(*b*) Inst. 2. 10. 2 & 3.

(*c*) 1 Inst. 7.

(*d*) "*Propria manu pro ignorantia literarum signum sanctæ crucis expressi et subscripsi.*" Seld. Jan. Angl. l. 1, sec. 42. And this (according to Procopius) the emperor Justin in the east, and Theodoric king of the Goths in Italy, had before authorised by their example, on account of their inability to write.

(13) See *ante*, p. 54, note.

Westminster-abbey, himself being brought up in Normandy, was witnessed only by his seal, and is generally thought to be the oldest sealed charter of any authenticity in England(e). At the conquest, the Norman lords brought over into this kingdom their own fashions; and introduced waxen seals only, instead of the English method of writing their names, and signing with the sign of the cross(f). And in the reign of Edward I. every freeman, and even such of the more substantial villeins as were fit to be put upon juries, had their distinct particular seals(g). The impressions of these seals were sometimes a knight on horseback, sometimes other devices: but coats of arms were not introduced into seals, nor indeed into any other use, till about the reign of Richard the first, who brought them from the croisade in the holy land; where they were first invented and painted on the shields of the knights, to distinguish the variety of persons of every christian nation who resorted thither, and who could not, when clad in complete steel, be otherwise known or ascertained.

Before the statute, sealing alone was sufficient,

This neglect of signing, and resting only upon the authenticity of seals, remained very long among us; for it was held in all our books, that sealing alone was sufficient to authenticate a deed: and so the common form of attesting deeds,—“sealed and delivered,” continues to this day; notwithstanding the statute 29 Car. II. c. 3, before mentioned, revives the Saxon custom, and expressly directs the signing, in all grants of lands, and many other species of deeds: in which, therefore, signing seems to be now as necessary as sealing, though it hath been sometimes held that the one includes the other(h) (14).

(e) Lamb. Archeion, 51.

(f) “Normanni chirographorum
“confectionem, cum crucibus aureis,
“aliisque signaculis sacris, in Anglia
“firmari solitam, in cæram impressam

“mutant, modumque scribendi Angli-
“cum rejiciunt.” Ingulph.

(g) Stat. Exon. 14 Edw. I.

(h) 3 Lev. 1; Stra. 764.

(14) In *Ellis v. Smith*, (1 Ves. jun. 13,) Chief Justice Willes said, “I do not think sealing is to be considered as signing; and I declare so now, because, if that question ever comes before me, I shall not think myself precluded from weighing it thorough-

ly, and decreeing that it is *not* signing, notwithstanding the *obiter dicta*, which in many cases were *nunquam dicta*, but barely the words of the reporters.” And see to the same effect, *Smith v. Evans*. (1 Wils. 313.)

A seventh requisite to a good deed is, that it be *delivered*, 7. Delivery. by the party himself or his certain attorney, which, therefore, is *also expressed in the attestation; “sealed and *delivered*.” [* 307] A deed takes effect only from this tradition or delivery; for if the date be false or impossible, the delivery ascertains the time of it. And, if another person seals the deed, yet, if the party delivers it himself, he thereby adopts the sealing(*i*), and by a parity of reason the signing also, and makes them both his own(15). A delivery may be either absolute, that is, to the party or grantee himself; or to a third person(16), to hold till some conditions be performed on the part of the grantee: in which last case it is not delivered as a *deed*, but as an *escrow*; that is, as a scrawl or writing, which is not to take effect as a deed till the conditions be performed; and then it is a deed to all intents and purposes(*j*).

The *last* requisite to the validity of a deed is the *attesta-* 8. Attestation. *tion*, or execution of it *in the presence of witnesses*: though this is necessary, rather for preserving the evidence, than for constituting the essence of the deed. Our modern deeds are, in reality, nothing more than an improvement or amplification of the *brevia testata* mentioned by the feodal writers(*k*); which were written memorandums, introduced to perpetuate the tenor of the conveyance and investiture, when grants by parol only became the foundation of frequent dispute and uncertainty. To this end they registered

(i) Perk. sec. 130.

(j) Co. Litt. 36.

(k) Feud. l. 1, t. 4.

(15) Mr. Christian observes that, “by 29 Car. II. c. 3, referred to above in the text, all leases and agreements, which are required to be in writing, must be signed by the party, or an agent lawfully authorised.

“With respect to leases and agreements specified in the first section, the agent must be authorised *by writing*, but in the fourth and seventeenth sections, the words, *by writing*, are omitted, and a parol authority to the agent will be sufficient with respect to the contracts therein enumerated.”

(16) In the delivery of a deed as an escrow, proper words to express the intent should be used; (Shep. Touch. 58;) and the delivery must be to a stranger; for, if a person delivers a deed to the party himself to whom it is made, though he professes to do so only as an escrow, and upon conditions, the delivery is absolute, and the deed will take effect immediately; nor will the party to whom it is delivered be bound to perform the previous conditions. (*Thoroughgood's case*, 9 Rep. 137; *Holford v. Parker*, Hob. 246; *Blunden v. Wood*, Cro. Jac. 86.)

in the deed the persons who attended as witnesses, which was formerly done without their signing their names, (that not being always in their power,) but they only heard the deed read; and then the clerk or scribe added their names, in a sort of memorandum; thus: "*hijis testibus, Johanne Moore, Jacobo Smith, et aliis ad hanc rem convocatis(l).*" This, like all other solemn transactions, was originally done only *coram paribus(m)* (17), and frequently when assembled in the court-baron, hundred, or county-court; which was then expressed in the attestation, *teste comitatu, hundredo, &c.(n)*. Afterwards the attestation of other witnesses was allowed, the trial, in *case of a dispute being still reserved to the *pares*; with whom the witnesses (if more than one) were associated and joined in the verdict(o); till that also was abrogated by the statute of York, 12 Edw. II. st. 1, c. 2. And in this manner, with some such clause of *hijis testibus*, are all old deeds and charters, particularly *magna carta*, witnessed. And in the time of Sir Edward Coke, creations of nobility were still witnessed in the same manner(p). But in the king's common charters, writs, or letters patent, the stile is now altered: for at present the king is his own witness, and attests his letters patent thus: "*Teste meipso*, witness ourself at Westminster, &c." a form which was introduced by Richard the first(q), but not commonly used till about the beginning of the fifteenth century; nor the clause of *hijis testibus* entirely discontinued till the reign of Henry the eighth(r): which was also the æra of discontinuing it in the deeds of subjects, learning being then revived, and the faculty of writing more general; and therefore, ever since that time the witnesses have usually subscribed their attestation, either at the bottom, or on the back of the deed(s) (18).

(l) Co. Litt. 7.

(m) Feud. l. 2, t. 32.

(n) Spelm. Gloss. 228; Madox. Formul. No. 221, 322, 660.

(o) Co. Litt. 6.

(p) 2 Inst. 77.

(q) Madox. Formul. No. 515.

(r) Ibid. Dissert. fol. 32.

(s) 2 Inst. 78. See pag. 378.

(17) See *ante*, p. 54, note.

(18) Mr. Christian remarks, "from the few laconic deeds of antiquity, being mostly feoffments, which I have

had an opportunity of seeing, I have observed that in the reign of Edw. IV. and before that time, they were neither subscribed by the parties nor witnesses.

III. We are next to consider, how a deed may be *avoided*, or rendered of no effect. And from what has been before laid down it will follow, that if a deed wants any of the essential requisites before mentioned; either 1. Proper parties and a proper subject-matter: 2. A good and sufficient consideration: 3. Writing on paper or parchment, duly stamped: 4. Sufficient and legal words, properly disposed: 5. Reading, if desired, before the execution: 6. Sealing; and, by the statute, in most cases signing also: or, 7. Delivery; it is a void deed *ab initio*. It may also be avoided by matter *ex post facto*: as, 1. By rasure, interlining, or other alteration in any material part; unless a memorandum be made thereof at the time of the execution and attestation^(t) (19). 2. By breaking off, or defacing the seal^(u). 3. By delivering it up to be cancelled; that is, to have lines drawn over it in the form of lattice-work or *cancelli*; though the phrase is now used figuratively for any manner of obliteration or defacing it. 4. By the disagreement of such, whose concurrence is necessary, in order for the deed to stand: as the husband, where a feme-covert is concerned; an infant, or person under duress, when those disabilities are removed; and the like. 5. By the judgment or decree of a court of judicature. This was anciently the province

III. How a deed may be avoided.

(t) 11 Rep. 27.

(u) 5 Rep. 23.

But they conclude, *in cujus rei testimonium huic chartæ (vel scripto) nostra sigilla apposuimus. Hiis testibus, &c.* But after that time the parties began to write their names over or near the seal. And in the reign of Hen. VIII., in general they are signed by the parties, but not by the witnesses; but in the next reign the practice commenced, that the witnesses, who the parties intended should afterwards prove the execution of the instrument, should also subscribe their names."

(19) Mr. Christian observes, that "such an alteration will also render void a bill of exchange or promissory note. 4 T. R. 320; 1 Anst. 225."—

[But the doctrine is not confined to negotiable instruments. (*Powell v. Divett*, 15 East, 32.)—Ed.]

"A bill may be altered in the terms of it at the time of making, or so soon afterwards that the alteration and the making may be construed as one act. But after it has been some time in the hands of the payee, it is void, though altered by the consent of all parties; a fresh stamp becomes necessary. But words written on a bill, which do not affect the responsibility of the acceptor or party against whom the action is brought, do not vitiate a bill or note." (*Cordwell v. Martin*, 1 Camp. p. 79; S. C. 9 East, 191.)

of the court of star-chamber, and now of the chancery : when it appears that the deed was obtained by fraud, force, or other foul practice : or is proved to be an absolute forgery(*w*). In any of these cases the deed may be voided, either in part or totally, according as the cause of avoidance is more or less extensive.

Of the several species of deeds, and their respective incidents.

And, having thus explained the general nature of deeds, we are next to consider their several species, together with their respective incidents. And herein I shall only examine the particulars of those, which, from long practice and experience of their efficacy, are generally used in the alienation of *real* estates : for it would be tedious, nay infinite, to descant upon all the several instruments made use of in *personal* concerns, but which fall under our general definition of a deed ; that is, a writing sealed and delivered. The former, being principally such as serve to *convey* the property of lands and tenements from man to man, are commonly denominated *conveyances* ; which are either conveyances at *common law*, or such as receive their force and efficacy by virtue of the *statute of uses*.

I. Conveyances, by the common law, are, *original* or *primary*, and *derivative* or *secondary*.

I. Of conveyances by the common law, some may be called *original*, or *primary* conveyances ; which are those by means whereof the benefit or estate is created or first arises : others are *derivative*, or *secondary* ; whereby the benefit, or estate originally created, is enlarged, restrained, transferred, or extinguished.

Original conveyances are—

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*Original conveyances are the following : 1. Feoffment ; 2. Gift ; 3. Grant ; 4. Lease ; 5. Exchange ; 6. Partition : *derivative* are, 7. Release ; 8. Confirmation ; 9. Surrender ; 10. Assignment ; 11. Defeazance.

1. Feoffment.

1. A feoffment, *feoffamentum*, is a substantive derived from the verb, to enfeoff, *feoffare* or *infeudare*, to give one a feud ; and therefore feoffment is properly *donatio feudi* (*x*). It is the most ancient method of conveyance, the most solemn and public, and therefore the most easily remembered and proved. And it may properly be defined, the gift of any corporeal hereditament to another. He that so gives, or enfeoffs, is called the *feoffor* ; and the person enfeoffed is denominated the *feoffee*.

(*w*) Toth. numo. 24 ; 1 Vern. 348.

(*x*) Co. Litt. 9.

This is plainly derived from, or is indeed itself the very mode of the ancient feodal donation; for though it may be performed by the word, "*enfeoff*" or "grant," yet the aptest word of feoffment is, "*do*" or "*dedi*" (*y*). And it is still directed and governed by the same feodal rules; inso-much that the principal rule relating to the extent and effect of the feodal grant, "*tenor est qui legem dat feudo*," is in other words become the maxim of our law with relation to feoffments, "*modus legem dat donationi*" (*z*). And therefore, as in pure feodal donations the lord, from whom the feud moved, must expressly limit and declare the continuance or quantity of estate which he meant to confer, "*ne quis plus donasse præsumatur, quam in donatione expresserit*" (*a*); so, if one grants by feoffment lands or tenements to another, and limits or expresses no estate, the grantee (due ceremonies of law being performed) hath barely an estate for life (*b*). For as the personal abilities of the feoffee were originally presumed to be the immediate or principal inducements to the feoffment, the feoffee's estate ought to be confined to his person, and subsist only for his life; unless the feoffor, by express provision in the creation *and constitution of the estate, hath given it a longer con- [* 311] tinuance. These express provisions are indeed generally made; for this was for ages the only conveyance, whereby our ancestors were wont to create an estate in fee-simple (*c*), by giving the land to the feoffee, to hold to him and his heirs for ever; though it serves equally well to convey any other estate of freehold (*d*).

The feoffor must expressly declare the quantity of estate he means to convey.

But by the mere words of the deed the feoffment is by no means perfected, there remains a very material ceremony to be performed, called *livery of seisin*; without which the feoffee has but a mere estate at will (*e*). This livery of seisin is no other than the pure feodal investiture, or delivery of corporal possession of the land or tenement; which was held absolutely necessary to complete the donation. "*Nam feudum sine investitura nullo modo constitui potuit*" (*f*); and an estate was then only perfect, when, as

The feoffee must have livery of seisin.

(*y*) Co. Litt. 9.

(*z*) Wright, 21.

(*a*) Pag. 108 [and 56].

(*b*) Co. Litt. 42.

(*c*) See Appendix, No. I.

(*d*) Co. Litt. 9.

(*e*) Litt. s. 66.

(*f*) Wright, 37.

the author of Fleta expresses it in our law, "*fit juris et seisinæ conjunctio*" (g) (20).

The origin of investiture.

Investitures, in their original rise, were probably intended to demonstrate in conquered countries the actual possession of the *lord*; and that he did not grant a bare litigious right, which the soldier was ill qualified to prosecute, but a peaceable and firm possession. And at a time when writing was seldom practised, a mere oral gift, at a distance from the spot that was given, was not likely to be either long or accurately retained in the memory of by-standers, who were very little interested in the grant. Afterwards they were retained as a public and notorious act, that the country might take notice of and testify the transfer of the estate; and that such, as claimed title by other means, might know against whom to bring their actions (21).

Consequences of the want of corporal possession.

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In all well-governed nations some notoriety of this kind has been ever held requisite, in order to acquire and ascertain *the property of lands. In the Roman law *plenum dominium* was not said to subsist, unless where a man had both the *right* and the *corporal possession*; which possession could not be acquired without both an actual intention to possess, and an actual seisin, or entry into the premises, or part of them in the name of the whole (h). And even in

(g) L. 3, c. 15, s. 5.

(h) *Nam apiscimur possessionem corpore et animo; neque per se corpore, neque per se animo. Non autem ita accipiendum est, ut qui fundum possidere velit, omnes glebas circum-*

ambulet; sed sufficit quamlibet partem ejus fundi introire. (Ff. 41. 2, 3.)

And again: *traditionibus dominia rerum, non nudis pactis, transferuntur.* (Cod. 2, 3, 20.)

(20) Lord Mansfield (in *Taylor v. Horde*, 1 Burr. 107,) said, in conformity with the text above, "seisin is a technical term, to denote the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass. Disseisin, consequently, means some way of turning the tenant out of his tenure, and usurping his place and feudal relation." It should be observed, however, that livery of seisin, though the fact be not indorsed on the deed of feoffment, will

be presumed, where the possession has gone according to the feoffment for a great length of time. (*Jackson v. Jackson*, Fitz-Gib. 147; *Throckmorton v. Tracey*, 1 Plowd. 149.) And a court of equity will even supply the admitted defect of livery of seisin, where a feoffment appears to have been made for a good or a valuable consideration. (*Thompson v. Attfield*, as stated from Reg. Lib. in Mr. Raithby's note to 1 Vern. 40; *Burgh v. Francis*, 1 Eq. Ca. Ab. 320.)

(21) See *ante*, p. 54, note.

ecclesiastical promotions, where the freehold passes to the person promoted, corporal possession is required at this day, to vest the property completely in the new proprietor; who, according to the distinction of the canonists (*i*), acquires the *jus ad rem*, or inchoate and imperfect right, by nomination and institution; but not the *jus in re*, or complete and full right, unless by corporal possession. Therefore in dignities possession is given by instalment; in rectories and vicarages by induction, without which no temporal rights accrue to the minister, though every ecclesiastical power is vested in him by institution. So also even in descents of lands by our law, which are cast on the heir by act of the law itself, the heir has not *plenum dominium*, or full and complete ownership, till he has made an actual corporal entry into the lands: for if he dies before entry made, *his* heir shall not be entitled to take the possession, but the heir of the person who was last actually seised (*k*). It is not therefore only a mere right to enter, but the actual entry that makes a man complete owner; so as to transmit the inheritance to his own heirs: *non jus, sed seisinam, facit stipitem* (*l*) (22).

Yet, the corporal tradition of lands being sometimes inconvenient, a symbolical delivery of possession was in many cases anciently allowed; by transferring something near at hand, in the presence of credible witnesses, which by agreement should serve to represent the very thing designed to be conveyed; and an occupancy of this sign or symbol was permitted as equivalent to occupancy of the land itself. Among the Jews we find the evidence of a purchase thus defined in the book of Ruth (*m*): "now this was the manner in former time in Israel, concerning redeeming and concerning changing, for to confirm all things: a man plucked off his shoe, and gave it to his neighbour; and this was a testimony in Israel." Among the ancient Goths and Swedes, contracts for the sale of lands were made in the presence of witnesses who extended the cloak of the buyer, while the seller cast a clod of the land into it, in order to give posses-

Symbolical delivery of possession anciently allowed.

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(*i*) Decretal, l. 3, t. 4, c. 40.

(*l*) Flet. l. 6, c. 2, s. 2.

(*k*) See pag. 209, 227, 228.

(*m*) Ch. 4, v. 7.

(22) See *ante*, pp. 128, 209, 227, with the notes thereto.

sion ; and a staff or wand was also delivered from the vendor to the vendee, which passed through the hands of the witnesses (*n*). With our Saxon ancestors the delivery of a turf was a necessary solemnity, to establish the conveyance of lands (*o*). And, to this day, the conveyance of our copyhold estates is usually made from the seller to the lord or his steward by delivery of a rod or verge, and then from the lord to the purchasor by re-delivery of the same, in the presence of a jury of tenants.

Introduction of
written convey-
ances.

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Conveyances in writing were the last and most refined improvement. The mere delivery of possession, either actual or symbolical, depending on the ocular testimony and remembrance of the witnesses, was liable to be forgotten or misrepresented, and became frequently incapable of proof. Besides, the new occasions and necessities, introduced by the advancement of commerce, required means to be devised of charging and encumbering estates, and of making them liable to a multitude of conditions and minute designations for the purposes of raising money, without an absolute sale of the land ; and sometimes the like proceedings were found useful in order to make a decent and competent provision for the numerous branches of a family, and for other domestic views. None of which could be effected by a mere, simple, corporal transfer of the soil from one man to another, which was principally calculated for conveying an absolute unlimited dominion. *Written deeds were therefore introduced, in order to specify and perpetuate the peculiar purposes of the party who conveyed ; yet still, for a very long series of years, they were never made use of, but in company with the more ancient and notorious method of transfer, by delivery of corporal possession.

Livery of seisin
necessary on the
grant of a free-
hold, whether of
inheritance, or
for life only.

Livery of seisin, by the common law, is necessary to be made upon every grant of an estate of freehold in hereditaments corporeal, whether of inheritance or for life only. In hereditaments incorporeal it is impossible to be made (23); for they are not the object of the senses ; and in leases for years, or other chattel interests, it is not necessary. In

(*n*) Stiernhook, de jure Sueon. l. 2, c. 4.

(*o*) Hickes, Dissert. Epistolar. 85.

(23) See *ante*, pp. 17, 22, 143, with the notes thereto.

leases for years indeed an actual *entry* is necessary, to vest the estate in the lessee: for the bare lease gives him only a right to enter, which is called his interest in the term, or *interesse termini*: and, when he enters in pursuance of that right, he is then and not before in possession of his term, and complete tenant for years (*p*) (24). This entry by the tenant himself serves the purpose of notoriety, as well as livery of seisin from the grantor could have done; which it would have been improper to have given in this case, because that solemnity is appropriated to the conveyance of a freehold. And this is one reason why freeholds cannot be made to commence *in futuro*, because they cannot (at the common law) be made but by livery of seisin; which livery, being an actual manual tradition of the land, must take effect *in præ-senti*, or not at all (*q*).

On the creation of a *freehold* remainder, at one and the same time with a particular estate for years, we have before seen, that, at the common law, livery must be made to the particular tenant (*r*). But, if such a remainder be created afterwards, expectant on a lease for years now in being, the livery must not be made to the lessee for years, for then it operates nothing; “*nam quod semel meum est, amplius meum esse non potest*” (*s*); but it must be made to the remainder-man *himself, by consent of the lessee for years; [* 315] for without his consent no livery of the possession can be given (*t*); partly because such forcible livery would be an ejectment of the tenant from his term, and partly for the reasons before given (*v*) for introducing the doctrine of attornments.

On the creation of an estate in remainder.

Livery of seisin is either in *deed*, or in *law*. Livery in *deed* is thus performed. The feoffor, lessor, or his attorney, together with the feoffee, lessee, or his attorney, (for this may as effectually be done by deputy or attorney, as by the principals themselves in person,) come to the land, or to the house; and there, in the presence of witnesses, declare the contents of the feoffment or lease, on which livery is to be

Livery in deed.

(*p*) Co. Litt. 46.

(*s*) Co. Litt. 49.

(*q*) See pag. 165.

(*t*) Ibid. 48.

(*r*) Pag. 167.

(*v*) Pag. 288.

(24) See *ante*, p. 144.

made. And then the feoffor, if it be of land, doth deliver to the feoffee, *all other persons being out of the ground*, a clod or turf, or a twig or bough there growing, with words to this effect: "I deliver these to you in the name of seisin of all the lands and tenements contained in this deed." But, if it be of a house, the feoffor must take the ring or latch of the door, *the house being quite empty* (25), and deliver it to the feoffee in the same form; and then the feoffee must enter alone, and shut to the door, and then open it, and let in the others (*w*). If the conveyance or feoffment be of divers lands, lying scattered in one and the same county, then in the feoffor's possession, livery of seisin of any parcel, in the name of the rest, sufficeth for all (*x*); but, if they be in several counties, there must be as many liveries as there are counties. For, if the title to these lands comes to be disputed, there must be as many trials as there are counties, and the jury of one county are no judges of the notoriety of a fact in another. Besides, anciently this seisin was obliged to be delivered *coram paribus de vicineto* (26), before the peers or freeholders of the neighbourhood, who attested such delivery in the body or on the back of the deed; according to the rule of the feudal law (*y*), *pares debent interesse investituræ feudi, et non alii*: for which this reason [*316] is expressly given: because *the peers or vassals of the lord, being bound by their oath of fealty, will take care that no fraud be committed to his prejudice, which strangers might be apt to connive at. And though afterwards the ocular attestation of the *pares* was held unnecessary, and livery might

(*w*) Co. Litt. 48; West. Symb. 251.

(*y*) Feud. l. 2, t. 58.

(*x*) Litt. s. 414.

(25) The *dicta* in the text must be understood to refer to the vacancy of the possession, not to the necessity of removing from the house or land any stranger who may be there, but who neither claims nor possesses any interest in the premises. If it were otherwise, it would be impossible to make livery of a public inn, or of a house in which there was a sick person; or the livery might be rendered void, by having a person concealed on

the premises, or, where the estate was large, in a remote part of it. The correct rule is laid down in *Sheph. Touchstone*, 213, namely, that, in every livery of seisin, it is necessary that all persons having *any lawful estate and possession* in the thing whereof livery is to be made, as *lessees and such like*, either join in the making thereof, or be removed. (*Doe v. Taylor*, 5 Barn. & Adol. 575.)

(26) See *ante*, p. 54, note.

be made before any credible witnesses, yet the trial, in case it was disputed, (like that of all other attestations (*z*),) was still reserved to the *pares* or jury of the county (*a*). Also, if the lands be out on lease, though all lie in the same county, there must be as many liveries as there are tenants : because no livery can be made in this case but by the consent of the particular tenant ; and the consent of one will not bind the rest (*b*). And in all these cases it is prudent, and usual, to endorse the livery of seisin on the back of the deed, specifying the manner, place, and time of making it ; together with the names of the witnesses (*c*). And thus much for livery in deed.

Livery in *law* is where the same is not made *on* the land, Livery in law. but *in sight of it* only ; the feoffor saying to the feoffee, “ I give you yonder land, enter and take possession.” Here, if the feoffee enters during the life of the feoffor, it is a good livery, but not otherwise ; unless he dares not enter, through fear of his life or bodily harm : and then his continual claim, made yearly, in due form of law, as near as possible to the lands (*d*), will suffice without an entry (*e*). This livery in law cannot however be given or received by attorney, but only by the parties themselves (*f*).

2. The conveyance by *gift*, *donatio*, is properly applied to 2. Gift. the creation of an estate-tail (27), as feoffment is to that of an estate in fee, and lease to that of an estate for life or years. It differs in nothing from a feoffment, but in the nature of the estate passing by it : for the operative words of conveyance in this case are *do* or *dedi* (*g*) ; and gifts in tail are equally imperfect without livery of seisin, as feoffments in fee-simple (*h*). *And this is the only distinction that Littleton [* 317] seems to take, when he says (*i*), “ it is to be understood “ that there is feoffor and feoffee, donor and donee, lessor “ and lessee ;” *viz.* feoffor is applied to a feoffment in fee-simple, donor to a gift in tail, and lessor to a lease for life,

(*z*) See pag. 307.

(*a*) Gilb. 10, 35.

(*b*) Dyer, 18.

(*c*) See Appendix, No. I.

(*d*) Litt. s. 421, &c.

(*e*) Co. Litt. 42.

(*f*) Ibid. 52.

(*g*) West. Symbol. 256.

(*h*) Litt. s. 59.

(*i*) S. 57.

(27) See *ante*, p. 110, note, and also p. 112.

or for years, or at will. In common acceptation, gifts are frequently confounded with the next species of deeds: which are,

3. Grant.

3. Grants, *concessionēs*; the regular method by the common law of transferring the property of *incorporeal* hereditaments, or such things whereof no livery can be had (*k*). For which reason all corporeal hereditaments, as lands and houses, are said to lie *in livery*; and the others, as advowsons, commons, rents, reversions, &c. to lie *in grant* (*l*) (28). And the reason is given by Bracton (*m*): “*traditio*, or livery, “*nihil aliud est quam rei corporalis de persona in personam, de manu in manum, translatio aut in possessionem inductio; sed res incorporales, quæ sunt ipsum jus rei vel corpori inhærens, traditionem non patiuntur.*” These, therefore, pass merely by the delivery of the deed. And in signiories, or reversions of lands, such grant, together with the attornment of the tenant (while attornments were requisite,) were held to be of equal notoriety with, and therefore equivalent to, a feoffment and livery of lands in immediate possession. It therefore differs but little from a feoffment, except in its subject matter: for the operative words therein commonly used are *dedi et concessi*, “have given and granted.”

4. Lease.

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4. A lease is properly a conveyance of any lands or tenements, (usually in consideration of rent or other annual recompence,) made for life, for years, or at will, but always for a *less* time than the lessor hath in the premises; for if it be for the *whole* interest, it is more properly an assignment than a lease. The usual words of operation in it are, “demise, grant, and to farm let: *demisi, concessi, et ad firmam tradidi.*” *Farm*, or *feorme*, is an old Saxon word, signifying provisions (*n*): and it came to be used instead of rent or render, because anciently, the greater part of rents were reserved in provisions; in corn, in poultry, and the like; till the use of money became more frequent. So that a farmer, *firmarius*, was one who held his lands upon payment of a rent or *feorme*; though at present, by a gradual

(*k*) Co. Litt. 9.(*l*) Ibid. 172.(*m*) L. 2, c. 18.(*n*) Spelm. Gl. 229.(28) See *ante*, chapters 2 and 3, with the notes thereto.

departure from the original sense, the word *farm* is brought to signify the very estate or lands so held upon farm or rent. By this conveyance an estate for life, for years, or at will, may be created, either in corporeal or incorporeal hereditaments; though livery of seisin is indeed incident and necessary to one species of leases, *viz.* leases for life of corporeal hereditaments; but to no other.

Whatever restriction, by the severity of the feudal law, might in times of very high antiquity be observed with regard to leases; yet by the common law, as it has stood for many centuries, all persons seised of any estate might let leases to endure so long as their own interest lasted, but no longer. Therefore, tenant in fee-simple might let leases of any duration; for he hath the whole interest: but tenant in tail, or tenant for life, could make no leases which should bind the issue in tail or reversioner; nor could a husband seised *jure uxoris*, make a firm or valid lease for any longer term than the joint lives of himself and his wife, for then his interest expired. Yet some tenants for life, where the fee-simple was in abeyance, might (with the concurrence of such as have the guardianship of the fee) make leases of equal duration with those granted by tenants in fee-simple, such as parsons and vicars with consent of the patron and ordinary (*o*). So also bishops, and deans, and such other sole ecclesiastical corporations as are seised of the fee-simple of lands in their corporate right, might, with the concurrence and confirmation of such persons as the law requires, have made leases for years, or for life, estates in tail, or in fee, without any limitation or control. And corporations aggregate *might have made what estates they pleased, without the confirmation of any other person whatsoever. Whereas now, by several statutes, this power, where it was unreasonable, and might be made an ill use of, is restrained; and where, in the other cases, the restraint by the common law seemed too hard, it is in some measure removed. The former statutes are called the *restraining*, the latter the *enabling* statute. We will take a view of them all, in order of time.

And first, the *enabling* statute, 32 Hen. VIII. c. 28, empowers three manner of persons to make leases, to endure

As to who were, at common law, empowered to make leases, and for what terms.

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The enabling statute, 32 Hen. VIII. c. 28, au-

(*o*) Co. Litt. 44.

thorises the granting of leases for three lives, or twenty-one years—1st, by tenants in tail, to bind their issue;—2nd, by husbands, seised in right of their wives, to bind the wife and her heirs;—3rd, by certain ecclesiastical persons, to bind their successors.

for three lives or one-and-twenty years; which could not do so before. As, first, tenant in tail may by such leases bind his issue in tail, but not those in remainder or reversion. Secondly, a husband seised in right of his wife, in fee-simple or fee-tail, provided the wife joins in such lease, may bind her and her heirs thereby. Lastly, all persons seised of an estate of fee-simple in right of their churches, which extends not to parsons and vicars (29), may (without the concurrence of any other person) bind their successors. But then there must many requisites be observed, which the statute specifies, otherwise such leases are not binding (*p*).
 1. The lease must be by indenture, and not by deed poll; or by parol. 2. It must begin from the making, or day of the making, and not at any greater distance of time (30). 3. If there be any old lease in being, it must be first absolutely surrendered, or be within a year of expiring. 4. It must be *either* for twenty-one years, *or* three lives, and not for both. 5. It must not exceed the term of three lives, or twenty-one years, but may be for a shorter term. 6. It must be of corporeal (31) hereditaments, and not of such things as lie merely in grant; for no rent can be reserved thereout by the common law, as the lessor cannot resort to them to

(*p*) Co. Litt. 44.

(29) This act, whilst expressly excluding parsons and vicars, extended only to other sole corporations, as bishops, deans, &c., not to corporations aggregate, as deans and chapters, &c. (*Bishop of Salisbury's case*, 10 Rep. 60 a.)

(30) Mr. Christian observes, that "by various acts of parliament, and also frequently by private settlements, a power is granted of making leases in possession, but not in reversion, for a certain term; the object being that the estate may not be encumbered by the act of the party beyond a specific time. Yet persons, who had this limited power of making leases in possession only, had frequently demised the premises to hold *from the day of the date*; and the courts in several instances had determined that

the words *from the day of the date* excluded the day of making the deed; and that of consequence these were leases in reversion, and void. But this question having been brought again before Lord Mansfield and the Court of King's Bench, that learned lord proved, with his usual ability, that *from the day* might either be inclusive or exclusive of the day; and therefore that it ought to be construed so as to effectuate these important deeds, and not to destroy them. (*Pugh v. Duke of Leeds*, Cowp. 714.)"

(31) But the statute of 5 Geo. III. c. 17, makes valid all leases of tithes, or other incorporeal hereditaments, for one, two, or three lives, or terms not exceeding twenty-one years, granted by ecclesiastical persons.

distrein (*q*). 7. It must be of *lands and tenements most commonly letten for twenty years past: so that if they had been let for above half the time (or eleven years out of the twenty) either for life, for years, at will, or by copy of court roll, it is sufficient. 8. The most usual and customary feorm or rent, for twenty years past, must be reserved yearly on such lease. 9. Such leases must not be made without impeachment of waste. These are the guards, imposed by the statute (which was avowedly made for the security of farmers and the consequent improvement of tillage,) to prevent unreasonable abuses, in prejudice of the issue, the wife, or the successor, of the reasonable indulgence here given.

Next follows, in order of time, the *disabling or restraining* statute, 1 Eliz. c. 19 (32), (made entirely for the benefit of the successor,) which enacts, that all grants by archbishops and bishops, (which include even those confirmed by the dean and chapter; the which, however long or unreasonable, were good at common law,) other than for the term of one-and-twenty years, or three lives, from the making, or without reserving the usual rent, shall be void. Concurrent leases, if confirmed by the dean and chapter, are held to be within the exception of this statute, and therefore valid; provided they do not exceed (together with the lease in being) the term permitted by the act (*r*). But by a saving expressly made, this statute of 1 Eliz. did not extend to grants made by any bishop to the crown; by which means queen Elizabeth procured many fair possessions to be made over to her by the prelates, either for her own use, or with intent to be granted out again to her favourites, whom she thus gratified without any expense to herself. To prevent

The *disabling or restraining* statute, 1 Eliz. c. 19, avoids all grants by archbishops and bishops, other than for the term of twenty-one years, or three lives, or without reserving the usual rent.

(*q*) But now, by the statute 5 Geo. III. c. 17, a lease of tithes or other incorporeal hereditaments, alone, may be granted by any bishop, or any such ecclesiastical or eleemosynary corporation, and the successor shall be entitled to recover the rent by an action of debt, which (in case of a freehold lease,) he could not have brought at the common law.

(*r*) Co. Litt. 45.

(32) This is but a private or particular statute, and must be specially pleaded, or courts of law will take no notice of it; (*Elmer's case*, 5 Rep. 2; *Talentine v. Denton*, Cro. Jac. 112;

Holland's case, 4 Rep. 76;) but the 13th of Eliz. is a general law, whereof the Judges are bound, *ex officio*, to take notice.

which(s) for the future the statute 1 Jac. I. c. 3, extends the prohibition to grants and leases made to the king, as well as to any of his subjects.

The 13 Eliz. c. 10,—14 Eliz. c. 11 & 14,—18 Eliz. c. 11,—and 43 Eliz. c. 29,—extend the restrictions to certain other inferior corporations.

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Next comes the statute 13 Eliz. c. 10, explained and enforced by the statutes 14 Eliz. c. 11 & 14, 18 Eliz. c. 11, and 43 Eliz. c. 29, which extend the restrictions laid by *the last-mentioned statute on bishops, to certain other inferior corporations, both sole and aggregate. From laying all which together we may collect, that all colleges, cathedrals, and other ecclesiastical or eleemosynary corporations, and all parsons and vicars, are restrained from making any leases of their lands, unless under the following regulations:—

1. They must not exceed twenty-one years, or three lives, from the making.
2. The accustomed rent, or more, must be yearly reserved thereon.
3. Houses in corporations, or market towns, may be let for forty years, provided they be not the mansion-houses of the lessors, nor have above ten acres of ground belonging to them; and provided the lessee be bound to keep them in repair; and they may also be aliened in fee-simple for lands of equal value in recompence.
4. Where there is an old lease in being, no concurrent lease shall be made, unless where the old one will expire within three years.
5. No lease (by the equity of the statute) shall be made without impeachment of waste (*t*).
6. All bonds and covenants tending to frustrate the provisions of the statutes of 13 & 18 Eliz. shall be void.

These latter statutes do not enable any persons to make such leases as they were by common law disabled from making;

but such leases though void as against all others, are good as against the lessor, during his life.

Concerning these restrictive statutes there are two observations to be made; first, that they do not, by any construction, enable any persons to make such leases as they were by common law disabled to make. Therefore a parson, or vicar, though he is restrained from making longer leases than for twenty-one years or three lives, even *with* the consent of patron and ordinary, yet is not enabled to make any lease at all, so as to bind his successor, *without* obtaining such consent(*u*). Secondly, that though leases contrary to these acts are declared void, yet they are good against the lessor, during his life, if he be a sole corporation; and are also good against an aggregate corporation so long as the head of it lives, who is presumed to be the most concerned in interest. For the act was intended for the benefit of the

(s) 11 Rep. 71.

(t) Co. Litt. 45.

(u) Ibid. 44.

successor only ; and no man shall make an advantage of his own wrong (*w*).

*There is yet another restriction with regard to college leases, by statute 18 Eliz. c. 6, which directs, that one-third of the old rent then paid, should for the future be reserved in wheat or malt, reserving a quarter of wheat for each 6*s.* 8*d.* or a quarter of malt for every 5*s.* ; or that the lessees should pay for the same according to the price that wheat and malt should be sold for, in the market next adjoining to the respective colleges on the market day before the rent becomes due. This is said (*x*) to have been an invention of lord treasurer Burleigh, and Sir Thomas Smith, then principal secretary of state ; who, observing how greatly the value of money had sunk, and the price of all provisions risen, by the quantity of bullion imported from the new-found Indies, (which effects were likely to increase to a greater degree,) devised this method for upholding the revenues of colleges. Their foresight and penetration has in this respect been very apparent : for, though the rent so reserved in corn was at first but one-third of the old rent, or half of what was still reserved in money, yet now the proportion is nearly inverted ; and the money arising from corn rents is, *communibus annis*, almost double to the rents reserved in money (33).

Directions in the statute 18 Eliz. c. 6, as to rents payable under college leases.

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The leases of beneficed clergymen are farther restrained, in case of their non-residence, by statutes 13 Eliz. c. 20, 14 Eliz. c. 11, 18 Eliz. c. 11, and 43 Eliz. c. 9, which direct,

As to non-resident clergymen.

(*w*) Co. Litt. 45.

(*x*) Strype's Annals of Eliz.

(33) Mr. Christian observes, that, when " the price of a quarter of wheat is 50*s.*, the colleges receiving a quarter of wheat, or its value, for every 13*s.* 4*d.* which they are paid in money, it follows that the corn rent will be in proportion to the money rent nearly as four to one.

" But both these rents united are very far from the present value. Colleges, therefore, in order to obtain the full value of the term, take a fine upon the renewal of their leases. It was a

great object to colleges to restrain those in possession from making long leases, and impoverishing their successors by receiving the whole value of the lease, by a fine at the commencement of the term.

" The corn-rent has made the old rent approach in some degree nearer to its present value ; otherwise it should seem the principal advantage of a corn-rent is to secure the lessor from the effect of a sudden scarcity of corn."

that if any beneficed clergyman be absent (34) from his cure above fourscore days in any one year, he shall not only forfeit one year's profit of his benefice, to be distributed among the poor of the parish; but that all leases made by him, of the profits of such benefice, and all covenants and agreements of like nature, shall cease and be void: except in the case of licensed pluralists, who are allowed to demise the living on which they are non-resident, to their curates only; provided such curates do not absent themselves above *forty days in any one year. And thus much for leases, with their several enlargements and restrictions(y).

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5. Exchange.

5. An *exchange* (35) is a mutual grant of equal interests, the one in consideration of the other. The word "exchange," is so individually requisite and appropriated by law to this case, that it cannot be supplied by any other word, or expressed by any circumlocution(z). The estates exchanged must be equal in quantity(a); not of *value*, for that is immaterial, but of *interest*; as fee-simple for fee-

(y) For the other learning relating to leases, which is very curious and diffusive, I must refer the student to 3 Bac. Abridg. 295, (title *Leases, and Terms for years*,) where the subject is treated in a perspicuous and masterly

manner; being supposed to be extracted from a manuscript of Sir Geoffrey Gilbert.

(z) Co. Litt. 50, 51.

(a) Litt. s. 64, 65.

(34) The various acts previously passed for enforcing the residence of spiritual persons on their benefices were repealed, for the purpose of being consolidated and amended by the statute of 57 Geo. III. c. 99. By the fifth section of this statute, it is enacted that any spiritual person holding any benefice, who shall, without such licence or exemption as in the act allowed, wilfully absent himself therefrom, for any space exceeding the space of three months together, or to be accounted at several times, in any one year, and make his residence or abiding at any other place, except some other benefice of which he may be possessed, shall, when such absence shall exceed such period as aforesaid, and

not exceed six months, forfeit one third of the annual value of the benefice from which he shall so absent himself; and when such absence shall exceed six months, and not exceed eight months, one half of such annual value; and when such absence shall exceed eight months, two-thirds of such annual value; and when such absence shall have been for the whole year, three-fourths of such annual value; and the whole of such penalty shall go to the informer, together with costs of suit.

The previous enactments, by which leases were vacated by non-residence, were repealed by the statute of 43 Geo. III. c. 84.

(35) See *ante*, p. 300, note.

simple, a lease for twenty years for a lease for twenty years, and the like. And the exchange may be of things that lie either in grant or in livery (*b*). But no livery of seisin, even in exchanges of freehold, is necessary to perfect the conveyance (*c*): for each party stands in the place of the other, and occupies his right, and each of them hath already had corporal possession of his own land. But entry must be made on both sides; for, if either party die before entry, the exchange is void, for want of sufficient notoriety (*d*). And so also, if two parsons, by consent of patron and ordinary, exchange their preferments; and the one is presented, instituted, and inducted, and the other is presented and instituted, but dies before induction; the former shall not keep his new benefice, because the exchange was not completed, and therefore he shall return back to his own (*e*). For, if, after an exchange of lands or other hereditaments, either party be evicted of those which were taken by him in exchange, through defect of the other's title; he shall return back to the possession of his own, by virtue of the implied warranty contained in all exchanges (*f*).

6. A partition (36) is when two or more joint-tenants, 6. Partition.
coparceners, or tenants in common, agree to divide the
*lands so held among them in severalty, each taking a [*324]
distinct part. Here, as in some instances there is a unity
of interest, and in all a unity of possession, it is necessary
that they all mutually convey and assure to each other the
several estates, which they are to take and enjoy separately.
By the common law, coparceners, being compellable to
make partition, might have made it by parol only; but
joint-tenants and tenants in common must have done it by
deed: and in both cases the conveyance must have been
perfected by livery of seisin (*g*). And the statutes of 31 Hen.
VIII. c. 1, and 32 Hen. VIII. c. 32, made no alteration in
this point. But the statute of frauds, 29 Car. II. c. 3, hath
now abolished this distinction, and made a deed in all cases
necessary.

(*b*) Co. Litt. 51.

(*c*) Litt. s. 62.

(*d*) Co. Litt. 50.

(*e*) Perk. s. 288.

(*f*) Page 300.

(*g*) Litt. s. 250; Co. Litt. 169.

(36) See *ante*, pp. 180, 189, and 323.

Secondary or
derivative con-
veyances are—

These are the several species of *primary* or *original* conveyances. Those which remain are of the *secondary*, or *derivative* sort; which presuppose some other conveyance precedent, and only serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance. As,

7. Release.

7. Releases: which are a discharge or conveyance of a man's right in lands or tenements, to another that hath some former estate in possession. The words generally used therein are "remised, released, and for ever quit-claimed" (*h*). And these releases may enure either, 1. By way of *enlarging an estate*, or *enlarger l'estate*: as if there be tenant for life or years, remainder to another in fee, and he in remainder releases all his right to the particular tenant and his heirs (37), this gives him the estate in fee (*i*). But, in this case, the releesee must be in *possession* (38) of some estate, for the release to work upon; for if there be lessee for years, and, before he enters and is in possession, the lessor releases to him all his right in the reversion, such release is void for want of possession in the releesee (*k*). 2. By way of *passing an estate*, or *mitter l'estate*: as when one of two coparceners releaseth all her *right to the other, this passeth the fee-simple of the whole (*l*). And in both these cases there must be a privity of estate between the releasor and releesee (*m*); that is, one of their estates must be so related to the other, as to make but one and the same estate in law. 3. By way of *passing a right*, or *mitter le droit*: as if a man be disseised, and releaseth to his disseisor all his right;

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(*h*) Litt. s. 445.

(*l*) Co. Litt. 273.

(*i*) Ibid. s. 465.

(*m*) Ibid. 272, 273.

(*k*) Ibid. s. 459.

(37) The words of inheritance are necessary to pass a fee by a release which enures by way of *enlarging an estate*; but no such words are required in a release which is to *pass an estate*, or a right. (1 Instit. 273 b, 274 a.)

(38) A *virtual* possession will suffice, if the releesee has an estate actually vested in him at the time of the release, which would be capable of enlargement by such release if he had the *actual*

possession. Thus, if a tenant for twenty years makes a lease to another for five years, who enters, a release to the first lessee is good, for the possession of his lessee was his possession. So, if a man makes a lease for years, remainder for years, and the first lessee enters, a release to the person in remainder for years is good, to enlarge his estate. (Mr. Hargrave's note (3) to Co. Litt. 270 a.)

hereby the disseisor acquires a new right, which changes the quality of his estate, and renders that lawful which before was tortious or wrongful (*n*). 4. By way of *extinguishment*: as, if my tenant for life makes a lease to A. for life, remainder to B. and his heirs, and I release to A.; this extinguishes my right to the reversion, and shall enure to the advantage of B.'s remainder as well as of A.'s particular estate (*o*) (39). 5. By way of *entry* and *feoffment*: as, if there be two joint disseisors, and the disseisee releases to one of them, he shall be sole seised, and shall keep out his former companion; which is the same in effect as if the disseisee had entered, and thereby put an end to the disseisin, and afterwards had enfeoffed one of the disseisors in fee (*p*). And hereupon we may observe, that, when a man has in himself the possession of lands, he must at the common law convey the freehold by feoffment and livery; which makes a notoriety in the country: but, if a man has only a right or a future interest, he may convey that right or interest by a mere release to him that is in possession of the land: for the occupancy of the relesee is a matter of sufficient notoriety already.

8. A confirmation (40) is of a nature nearly allied to a re- 8. Confirmation.

(*n*) Litt. s. 466.

(*o*) Ibid. s. 470.

(*p*) Co. Litt. 278.

(39) No privity is necessary when a *release* of a right is made to one who hath an estate of freehold, in deed or in law; but a release cannot enure by way of *passing* a right, unless it is made to one having a fee-simple; for, the person to whom a right is *passed* must have the *whole* right; (see the next note;) to a person not having the fee, therefore, a release of right operates, as it were, by extinguishment in respect of him that made the release; which extinguishment shall enure to him in remainder, though the right is not extinct in deed. (1 Instit. 275 a, 279 b.) If a release of all *actions* be made to a tenant for life, the person in remainder, after the death of the tenant for life, shall have no benefit

from this release. (1 Instit. 275 b, 285 b; *Edward Altham's case*, 8 Rep. 302; *Lampet's case*, 10 Rep. 51.

(40) A confirmation of title establishes that estate or interest which the tenant already has: a release in enlargement of estate is the relinquishment to the tenant of a right which he had not before. A confirmation of title is not, in all respects, subject to the same rules as a release of right: a more immediate estate may be confirmed, without confirming a more remote one; but a release of right for a moment is a release for ever. (1 Instit. 274 a, 297 a.)

If a disseisor makes a lease for one hundred years, the disseisee may confirm parcel of those years, but then it must be by apt words; he must not

[* 326] lease. Sir Edward Coke defines it(*q*) to be a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased: and the words of making it are these, “have given, “granted, ratified, approved, and confirmed”(*r*). An instance of the first branch of the definition is, if tenant for life leaseth for forty years, and dieth during that term; here the lease for years is voidable by him in reversion: yet, if he * hath confirmed the estate of the lessee for years, before the death of tenant for life, it is no longer voidable but sure (*s*). The latter branch, or that which tends to the increase of a particular estate, is the same in all respects with that species of release which operates by way of enlargement.

9. Surrender.

9. A surrender, *sursumredditio*, or rendering up, is of a nature directly opposite to a release; for, as that operates by the greater estate's descending upon the less, a surrender is the falling of a less estate into a greater (41). It is defined (*t*), a yielding up of an estate for life or years to him that hath the immediate reversion or remainder wherein the particular estate may merge or drown, by mutual agreement between them. It is done by these words, “hath surrendered, granted, and yielded up” (42). The surrenderor

(*q*) 1 Inst. 295.

(*r*) Litt. s. 515, 531.

(*s*) Ibid. s. 516.

(*t*) Co. Litt. 337.

confirm the lease or demise, or the estate of the lessee, for then, the addition “for parcel of the term” would be repugnant, when the whole was confirmed before; but the confirmation must be of the land, for part of the term. The confirmation may be of part of the land; as, if the lease for years were of forty acres, it may be confirmed as to twenty acres: but an estate of freehold cannot be confirmed for part of the estate, for such an estate is integral and indivisible; but years are several, and a term composed of them is fractional and divisible. (1 Instit. 297 a.)

(41) This may be effected either by a surrender in fact, (as defined in the text,) or by a surrender in law, by the

acceptance of an estate inconsistent with a prior estate. Thus, if a valid new lease be made to a person in possession under an old lease, this will, without any actual surrender, operate as a surrender in law of the old lease. (Shep. Touch. 300; *Ive's case*, 5 Rep. 116; *Fulmerston v. Steward*, 1 Plowd. 108; *S. C. Dyer*, 103 a; *Willis v. Whitewood*, 1 Leon. 322.)

(42) Mere cancellation will not amount to a surrender, either in fact or in law, of a lease: (*M'Gennis v. Mac Cullock*, Gilb. Equ. Rep. 236:) for, the cancelling of an instrument does not re-vest the interest which it conveyed. (*Doe v. Bingham*, 4 Barn. & Ald. 677.)

must be in possession (*u*); and the surrenderee must have a higher estate (43), in which the estate surrendered may merge; therefore, tenant for life cannot surrender to him in remainder for years (*w*). In a surrender there is no occasion for livery of seisin (*x*); for there is a privity of estate between the surrenderor and the surrenderee; the one's particular estate, and the other's remainder are one and the same estate; and livery having been once made at the creation of it, there is no necessity for having it afterwards. And, for the same reason, no livery is required on a release or confirmation in fee to tenant for years or at will, though a freehold thereby passes; since the reversion of the releasor, or confirmor, and the particular estate of the releesee, or confirmee, are one and the same estate; and where there is already a possession, derived from such a privity of estate, any farther delivery of possession would be vain and nugatory (*y*).

10. An *assignment* is properly a transfer, or making over to another, of the right one has in *any* estate; but it is usually applied to an estate for life or years. And it differs from a lease only in this: that by a lease one grants an interest less *than his own, reserving to himself a reversion; in assignments he parts with the whole property, and the assignee stands to all intents and purposes in the place of the assignor (44). 10. Assignment. [*327]

(*u*) Co. Litt. 338.

(*w*) Perk. s. 589.

(*x*) Co. Litt. 50.

(*y*) Litt. s. 460.

(43) This is not quite accurate, if it be good law (as appears to be settled) that one termor may surrender to another; and that such surrender will be good, though the term of the surrenderor is longer than the term of the surrenderee. (*Hughes v. Robotham*, Cro. Eliz. 303.)

(44) Mr. Christian observes, that "this is far from being universally true; for there is a great variety of distinctions when the assignee is bound by the covenants of the assignor, and when he is not. The general rule is, that he is bound by all covenants which run with the land;

but not by collateral covenants which do not run with the land. As, if a lessee covenants for himself, executors, and administrators, concerning a thing not in existence, as, to build a wall upon the premises, the assignee will not be bound; but, in that case, the assignee will be bound, if the lessee has covenanted for himself and assigns. Where the lessee covenants for himself, his executors, and administrators, to reside upon the premises, this covenant binds his assignee, for it runs with, or is appurtenant to, the thing demised. (2 Hen. Bl. 133.) The assignee in

11. Defeazance.

11. A defeazance is a collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be *defeated* (*z*) or totally undone. And in this manner mortgages were in former times usually made; the mortgagor enfeoffing the mortgagee, and he at the same time executing a deed of defeazance, whereby the feoffment was rendered void on repayment of the money borrowed at a certain day. And this, when executed at the same time with the original feoffment, was considered as part of it by the ancient law (*a*); and therefore only indulged (45); no subsequent secret revocation of a solemn conveyance, executed by livery of seisin, being allowed in those days of simplicity and truth; though, when uses were afterwards introduced, a revocation of such uses was permitted by the courts of equity. But things that were merely executory, or to be completed by matter subsequent, (as rents, of which no seisin could be had till the time of payment,) and so also annuities, conditions, warranties, and the like, were always liable to be recalled by defeazances made subsequent to the time of their creation (*b*).

II. Of conveyances that operate by virtue of the stat. of uses.

II. There yet remain to be spoken of some few conveyances, which have their force and operation by virtue of the *statute of uses*.

Of the nature of uses and trusts.

Uses and *trusts* are, in their original, of a nature very simi-

(*z*) From the French verb *defaire*, *infectum reddere*.

(*a*) Co. Litt. 236.

(*b*) Ibid. 237.

no case is bound by the covenant of the lessee, to build a house for the lessor any where off the premises, or to pay money to a stranger. (*Spencer's case*, 5 Co. 16.) The assignee is not bound by a covenant broken before assignment. (3 Burr. 1271. See Com. Dig. Covenant.) If an underlease is made even for a day less than the whole term, the underlessee is not liable for rent or covenants to the original lessor, like an assignee of the whole term. (Doug. 184.)

An assignee is liable for rent only whilst he continues in possession

under the assignment. And he is held not to be guilty of a fraud, if he assigns even to a beggar, or to a person leaving the kingdom, provided the assignment be executed before his departure. (1 B. & P. 21.)

(45) A defeazance is now seldom resorted to, as it is a much preferable course to make the conditions apparent in the deed itself, so that the complete nature of the transaction may appear in one and the same instrument.

As to defeazances of bonds, or judgments, see *post*, p. 342.

lar, or rather exactly the same : answering more to the *fidei-commissum* than the *usus fructus* of the civil law : which latter was the temporary right of using a thing, without having the ultimate property, or full dominion of the substance (c). But the *fidei-commissum*, which usually was created by will, was the disposal of an inheritance to one, in confidence that he *should convey it, or dispose of the profits, at the will of another. And it was the business of a particular magistrate, the *prætor fidei-commissarius*, instituted by Augustus, to enforce the observance of this confidence (d). So that the right thereby given was looked upon as a vested right, and entitled to a remedy from a court of justice : which occasioned that known division of rights by the Roman law, into *jus legitimum*, a legal right, which was remedied by the ordinary course of law ; *jus fiduciarium*, a right in trust, for which there was a remedy in conscience ; and *jus precarium*, a right in curtesy, for which the remedy was only by intreaty or request (e). In our law, a use might be ranked under the rights of the second kind ; being a confidence reposed in another who was tenant of the land, or *terre-tenant*, that he should dispose of the land according to the intentions of *cestuy que use*, or him to whose use it was granted, and suffer him to take the profits (f). As, if a feoffment was made to A. and his heirs, to the use of (or in trust for) B. and his heirs ; here, at the common law, A. the *terre-tenant* had the legal property and possession of the land, but B. the *cestuy que use* was in conscience and equity to have the profits and disposal of it (46).

(c) Ff. 7. 1. 1.

8vo. 306.

(d) Inst. 2, tit. 23.

(f) Plowd. 352.

(e) Ff. 43. 26. 1 ; Bacon on Uses,

(46) Uses evaded, without overturning, the common law. The estate was regularly transferred by a common law conveyance to some person as a trustee, and he, at law, was the absolute owner of the property ; so much so, that the real owner would have been deemed a trespasser had he entered without the authority, express or implied, of the legal tenant. But,

in equity, the legal tenant and his heirs were by degrees considered the mere nominees of the person by whom the estate was conveyed, and were deemed bound to execute all his directions in regard to the estate. After the relation of trustee and *cestui que use* was thus established, all the refinements which we now meet with in settlements of real property,

Their first introduction into our law.

This notion was transplanted into England from the civil law, about the close of the reign of Edward III. (*g*), by means of the foreign ecclesiastics; who introduced it to evade the statutes of mortmain, by obtaining grants of lands, not to their religious houses directly, but to *the use of* the religious houses (*h*): which the clerical chancellors of those times held to be *fidei-commissa*, and binding in conscience; and therefore assumed the jurisdiction which Augustus had vested in his *prætor*, of compelling the execution of such trusts in the Court of Chancery. And, as it was most easy to obtain such grants from dying persons, a maxim was established, that though by law the lands themselves were not devisable, yet, if a testator had enfeoffed another to his own use, and so was *possessed of the use only, such use was devisable by will. But we have seen (*i*) how this evasion was crushed in its infancy, by statute 15 Ric. II. c. 5, with respect to religious houses.

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Their establishment by the courts of equity.

Yet, the idea being once introduced, however fraudulently, it afterwards continued to be often innocently, and sometimes very laudably, applied to a number of civil purposes: particularly as it removed the restraint of alienations by will (47), and permitted the owner of lands in his lifetime to make various designations of their profits, as prudence, or justice, or family convenience, might from time to time require. Till, at length, during our long wars in France, and the subsequent civil commotions between the houses of York and Lancaster, uses grew almost universal; through the desire that men had (when their lives were continually in hazard) of providing for their children by will, and of securing their estates from forfeitures; when each of the contending parties, as they became uppermost, alternately

(*g*) Stat. 50 Edw. III. c. 6; 1 Ric. II. c. 9; 1 Rep. 138.

(*h*) See pag. 271.

(*i*) Pag. 272.

soon became established *in equity*. (Sugden's Introduc. to Gilb. on Uses and Trusts.)

(47) For, the will of *cestui que use* affected only the equitable right to the land, which was not subject to the feudal rule of law; and it was thought reasonable, upon a distinction

started between the land and the use of the land, that the *cestui que use* might dispose of the *profits* by will; the legal estate still continuing in the feoffee to uses. (Wright's Law of Ten. 172, 174; and see *Chudleigh's case*, 1 Rep. 123 b; *S. C.* 1 Anders. 323.)

attainted the other. Wherefore, about the reign of Edw. IV., (before whose time, Lord Bacon remarks (*k*), there are not six cases to be found relating to the doctrine of uses,) the courts of equity began to reduce them to something of a regular system.

Originally it was held that the chancery could give no relief, but against the very person himself intrusted for *cestuy que use*, and not against his heir or alienee. This was altered in the reign of Henry VI., with respect to the heir (*l*); and afterwards the same rule, by a parity of reason, was extended to such alienees as had purchased either without a valuable consideration, or with an express notice of the use (*m*). But a purchasor for a valuable consideration, without notice, might hold the land discharged of any trust or confidence. And also, it was held, that neither the king or queen, on account of their dignity royal (*n*), nor any corporation *aggregate, on account of its limited capacity (*o*), [* 330] could be seised to any use but their own; that is, they might hold the lands, but were not compellable to execute the trust. And, if the feoffee to uses died without heir, or committed a forfeiture, or married, neither the lord who entered for his escheat or forfeiture, nor the husband who retained the possession as tenant by the curtesy, nor the wife to whom dower was assigned, were liable to perform the use (*p*): because they were not parties to the trust, but came in by act of law: though doubtless their title in reason was no better than that of the heir.

On the other hand the use itself, or interest of *cestuy que use*, was learnedly refined upon with many elaborate distinctions. And, 1. It was held that nothing could be granted to a use, whereof the use is inseparable from the possession; as annuities, ways, commons, and authorities *quæ ipso usu consumuntur* (*q*): or whereof the seisin could not be instantly given (*r*). 2. A use could not be raised without a sufficient consideration. For where a man makes a feoffment to another, without any consideration, equity

Progress of the doctrine of uses.

Nothing whereof the use is inseparable from the possession, could be granted to a use.

Uses could not be raised without a sufficient consideration;

(*k*) On Uses, 313.

(*l*) Keilw. 42; Year-book, 22 Edw.

IV. 6.

(*m*) Keilw. 46; Bacon of Uses, 312.

(*n*) Bro. Abr. tit. Feoffm. al Uses, 31; Bacon of Uses, 346, 347.

(*o*) Bro. Abr. tit. Feoffm. al Uses, 40; Bacon, 347.

(*p*) 1 Rep. 122.

(*q*) 1 Jon. 127.

(*r*) Cro. Eliz. 401.

were descendible in the same manner as inheritances in possession ;

and might be assigned or devised :

presumes that he meant it to the use of himself (*s*) (48), unless he expressly declares it to be to the use of another, and then nothing shall be presumed contrary to his own expressions (*t*). But, if either a good or a valuable consideration appears, equity will immediately raise a use correspondent to such consideration (*u*). 3. Uses were descendible according to the rules of the common law, in the case of inheritances in possession (*w*) (49); for in this and many other respects *æquitas sequitur legem*, and cannot establish a different rule of property from that which the law has established. 4. Uses might be assigned by secret deeds between the parties (*x*), or be devised by last will and testament (*y*); for, as the legal estate in the soil

(*s*) See pag. 296.

(*t*) 1 And. 37.

(*u*) Moor, 684.

(*w*) 2 Roll. Abr. 780.

(*x*) Bacon of Uses, 312.

(*y*) Ibid. 308.

(48) See *ante*, p. 296. In the second section of the 3rd chapter of Gilbert on Uses, p. 222, the law is in substance thus laid down. If a feoffment be made, or a fine be levied, or recovery be suffered, without consideration, and no uses be expressed, the use results to the feoffor and his heirs. But if any uses be expressed, it shall be to those uses, though no consideration be had; and herein is the difference between raising uses by fine, feoffment, or other conveyance operating by transmutation of possession, and uses raised by covenant; for, upon the first, if no uses were expressed, it is equity that assigns the feoffor to have the resulting use; by the law, the feoffor has parted with all his interest; (see *Cave v. Holford*, 3 Ves. 667;) but where he expresses uses, there can be no equity in giving him the use against his own will. On the other hand, in case of a covenant there can be no use without a consideration; for the covenantee in such case can have no right by law, and there is no reason why equity should give him the use. (And see *Calthrop's case*, Moor, 101; *Stephen's case*, 1

Leon. 138; Jenkins' Cent. 6, case 36; *Mildmay's case*, 1 Rep. 176; 2 Roll's Ab. 790.)

(49) Chief Justice Eyre (in *Cave v. Holford*, 3 Ves. 667,) said, a use which results is the original use; and this is not a mere dry proposition, productive of no legal consequence; the course of descent is regulated by it. For instance, in the case of a conveyance by a man seised *ex parte maternâ*, if the use results, it results to him in the same manner: so it is where the use is expressly limited to the party from whom the estate moved; it would be in him as his old estate, and go to the heirs *ex parte maternâ*. (Co. Litt. 13 a; *Abbot v. Burton*, Salk. 590; *Martin v. Strachan*, 5 T. R. 107, n.) But, since this note was first published, it has been enacted, by the statute of 3 & 4 Gul. IV. c. 106, s. 3, that, when any land shall have been limited, by any assurance executed after the last day of December, 1833, to the party conveying or to his heirs, such person shall be considered to have acquired the same as purchaser, and not to be entitled thereto as his former estate.

was not transferred by these transactions, no livery of seisin was necessary; *and, as the intention of the parties was the leading principle in this species of property, any instrument declaring that intention was allowed to be binding in equity. But *cestuy que use* could not at common law aliene the legal interest of the lands, without the concurrence of his feoffee (*z*); to whom he was accounted by law to be only tenant at sufferance (*a*). 5. Uses were not liable to any of the feudal burthens; and particularly did not escheat for felony or other defect of blood; for escheats, &c., are the consequence of *tenure* (50), and uses are *held* of nobody: but the land itself was liable to escheat, whenever the blood of the feoffee to uses was extinguished by crime or by defect; and the lord (as was before observed) might hold it discharged of the use (*b*). 6. No wife could be endowed, or husband have his curtesy, of a use (*c*) (51): for no trust was declared for their benefit, at the original grant of the estate. And therefore it became customary, when most estates were put in use, to settle before marriage some joint estate to the use of the husband and wife for their lives; which was the original of modern jointures (*d*). 7. A use could not be extended by writ of *elegit*, or other legal process, for the debts of *cestuy que use* (*e*). For, being merely a creature of equity, the common law, which looked no farther than to the person actually seised of the land, could award no process against it.

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but they were not liable to the feudal burthens;

nor to dower, or tenancy by curtesy;

nor to be extended by *elegit*, &c.

It is impracticable, upon our present plan, to pursue the doctrine of uses through all the refinements and niceties which the ingenuity of the times (abounding in subtile disquisitions) deduced from this child of the imagination, when once a departure was permitted from the plain simple rules of property established by the ancient law. These principal outlines will be fully sufficient to show the ground of Lord Bacon's complaint (*f*), that this course of proceeding "was

Alterations by various statutes.

(z) Stat. 1 Ric. III. c. 1.

(d) See pag. 137.

(a) Bro. Abr. *ibid.* 23.(e) Bro. Abr. tit. *Executions*, 90.

(b) Jenk. 190.

(f) Use of the Law, 153.

(c) 4 Rep. 1; 2 And. 75.

(50) See *ante*, pp. 72 and 244, with the notes thereto. as to the doctrines of curtesy, dower, and jointure.

(51) See *ante*, pp. 127, 129, 137,

“turned to deceive many of their just and reasonable rights.
 [* 332] “A man that had cause to sue for land, knew not against
 “whom to *bring his action, or who was the owner of it.
 “The wife was defrauded of her thirds; the husband of his
 “curtesy; the lord of his wardship, relief, heriot, and es-
 “cheat; the creditor of his extent for debt; and the poor
 “tenant of his lease.” To remedy these inconveniences
 abundance of statutes were provided, which made the lands
 liable to be extended by the creditors of *cestuy que use* (*g*),
 allowed actions for the freehold to be brought against him,
 if in the actual pernancy or enjoyment of the profits (*h*);
 made him liable to actions of waste (*i*); established his con-
 veyances and leases made without the concurrence of his
 feoffees (*h*); and gave the lord the wardship of his heir,
 with certain other feudal perquisites (*l*).

The statute of
uses.

These provisions all tended to consider *cestuy que use* as
 the real owner of the estate; and at length that idea was
 carried into full effect by the statute 27 Hen. VIII. c. 10,
 which is usually called the *statute of uses*, or, in convey-
 ances and pleadings, the statute *for transferring uses into*
possession. The hint seems to have been derived from what
 was done at the accession of king Richard III.; who, hav-
 ing, when duke of Gloucester, been frequently made a feoffee
 to uses, would upon the assumption of the crown (as the law
 was then understood) have been entitled to hold the lands
 discharged of the use. But, to obviate so notorious an in-
 justice, an act of parliament was immediately passed (*m*),
 which ordained, that, where he had been so enfeoffed joint-
 ly with other persons, the land should vest in the other
 feoffees, as if he had never been named; and that, where he
 stood solely enfeoffed, the estate itself should vest in *cestuy*
que use in like manner as he had the use. And so the sta-
 tute of Hen. VIII., after reciting the various inconveniences
 before-mentioned, and many others, enacts, that “when any
 [* 333] “person shall be *seised* of lands, &c., to the use, confidence,
 “or trust, of any other person or body *politic, the person
 “or corporation entitled to the use in fee-simple, fee-tail,

(*g*) Stat. 50 Edw. III. c. 6; 2 Ric.
 II. sess. 2, c. 3; 19 Hen. VII. c. 15.
 (*h*) Stat. 1 Ric. II. c. 9; 4 Hen. IV.
 c. 7, c. 15; 11 Hen. VI. c. 3; 1 Hen.
 VII. c. 1.

(*i*) Stat. 11 Hen. VI. c. 5.
 (*k*) Stat. 1 Ric. III. c. 1.
 (*l*) Stat. 4 Hen. VII. c. 17; 19 Hen.
 VII. c. 15.
 (*m*) 1 Ric. III. c. 5.

“ for life, or years, or otherwise, shall from thenceforth
 “ stand and be seised or possessed of the land, &c., of and
 “ in the like estates as they have in the use, trust, or confi-
 “ dence ; and that the estate of the person so seised to uses
 “ shall be deemed to be in him or them that have the use,
 “ in such quality, manner, form, and condition as they had
 “ before in the use.” The statute thus *executes* the use, as
 our lawyers term it ; that is, it conveys the possession to
 the use, and transfers the use into possession ; thereby mak-
 ing *cestuy que use* complete owner of the lands and tene-
 ments, as well at law as in equity.

The statute having thus not abolished the conveyance to
 uses, but only annihilated the intervening estate of the feof-
 fee, and turned the interest of *cestuy que use* into a legal
 instead of an equitable ownership ; the courts of common
 law began to take cognizance of uses, instead of sending the
 party to seek his relief in chancery. And, considering
 them now as merely a mode of conveyance, very many of
 the rules before established in equity were adopted with
 improvements by the judges of the common law. The same
 persons only were held capable of being seised to a use, the
 same considerations were necessary for raising it, and it
 could only be raised of the same hereditaments as formerly.
 But as the statute, the instant it was raised, converted it
 into an actual possession of the land, a great number of the
 incidents, that formerly attended it in its fiduciary state,
 were now at an end. The land could not escheat or be for-
 feited by the act or defect of the feoffee, nor be aliened to
 any purchasor discharged of the use, nor be liable to dower
 or curtesy, on account of the seisin of such feoffee ; because
 the legal estate never rests in him for a moment, but is in-
 stantaneously transferred to *cestuy que use* as soon as the
 use is declared. And, as the use and the land were now
 convertible terms, they became liable to dower, curtesy, and
 escheat, in consequence of the seisin of *cestuy que use*, who
 was now become the *terre-tenant* also ; and they likewise
 were no longer devisable by will.

*The various necessities of mankind induced also the
 judges very soon to depart from the rigour and simplicity of
 the rules of the common law, and to allow a more minute
 and complex construction upon conveyances to uses than
 upon others. Hence it was adjudged, that the use need not

Effect of that
statute.

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The use need
not always be
executed the
instant the con-
veyance is
made.

always be executed the instant the conveyance is made: but, if it cannot take effect at that time, the operation of the statute may wait till the use shall arise upon some future contingency, to happen within a reasonable period of time; and in the meanwhile the ancient use shall remain in the original grantor: as, when lands are conveyed to the use of A. and B., after a marriage shall be had between them (*n*), or to the use of A. and his heirs till B. shall pay him a sum of money, and then to the use of B. and his heirs (*o*). Which doctrine, when devised by will were again introduced, and considered as equivalent in point of construction to declarations of uses, was also adopted in favour of *executory devises* (*p*). But herein these, which are called *contingent* or *springing* uses (52), differ from

Contingent or
springing uses.

(*n*) 2 Roll. Abr. 791; Cro. Eliz. 439.

(*o*) Bro. Abr. tit. *Feoffm. al Uses*, 30.

(*p*) See pag. 173.

(52) Mr. Sugden devotes a learned and instructive note, of considerable length, (annexed to the second chapter of his edition of Gilbert on Uses,) to an elucidation of this subject. The reader will do well to peruse the whole, and not rest satisfied with the following extracts. Mr. Sugden says, shifting, secondary, and springing uses, are frequently confounded with each other, and with future or contingent uses. They may perhaps be thus classed: 1st, *Shifting* or *secondary* uses, which take effect in derogation of some other estate, and are either limited expressly by the deed, or are authorised to be created by some person named in the deed. 2ndly, *Springing* uses, confining this class to uses limited to arise on a future event, where no *preceding* use is limited, and which do not take effect in derogation of any other interest than that which results to the grantor, or remains in him, in the mean time. 3rdly, *Future* or *contingent* uses, are properly uses to take effect as remainders; for instance, a use to the first unborn son of A., after a previous limitation to him for life, or for years, determinable on his life, is a future or contingent

use; but yet does not answer the notion of either a shifting or a springing use. Contingent uses naturally arose, after the statute of 27 Hen. VIII., in imitation of contingent remainders.

The first class, that is, *shifting* or *secondary* uses, are at this day so common that they pass without observation. In every marriage settlement, the first use is to the owner in fee until marriage, and after the marriage to other uses. Here, the owner, in the first instance, takes the fee, which upon the marriage ceases, and the new use arises. But a shifting use cannot be limited on a shifting use: and shifting uses must be confined within such limits as not to tend to a perpetuity. (See *ante*, p. 174, and notes.) But a shifting use may be created after an estate-tail, to take effect at any period, however remote; because the tenant in tail for the time being may, by a recovery, defeat the shifting use.

As to the second class, or *springing* uses, before the statute of Hen. VIII. there was no mischief in an independent original springing use, to commence at a distant period, because the legal estate remained in the trustee.

an executory devise ; in that there must be a person seised to such uses at the time when the contingency happens, else they can never be executed by the statute ; and therefore, if the estate of the feoffee to such use be destroyed by alienation or otherwise, before the contingency arises, the use is destroyed for ever (*q*) : whereas, by an executory devise, the freehold itself is transferred to the future devisee. And, in both these cases, a fee may be limited to take effect after a fee (*r*) ; because, though that was forbidden by the common law in favour of the lord's escheat, yet when the legal estate was not extended beyond one fee-simple, such subsequent uses (after a use in fee) were, before the statute, permitted to be limited in equity ; and then the statute executed the legal estate in the same manner as the use before subsisted. It was also held, that a use, though executed, may change from one to another by circumstances *ex post facto* (*s*) ; as, if A. makes a feoffment *to the use of his intended wife and her eldest son, for their lives, upon the mar-

Secondary or
shifting uses.

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(*q*) 1 Rep. 134, 138 ; Cro. Eliz. 439.

(*r*) Pollexf. 78 ; 10 Mod. 423.

(*s*) Bro. Abr. tit. Feoffm. al Uses, 30.

After the statute, too, the use was held to result to, or remain in, the person creating the future use, according to the mode of conveyance adopted, till the springing use arose. This resulting use the statute executed, so that the estate remained in the settlor till the period when the use was to rise : which might be at any time within the limits allowed by law, in case of an executory devise. When springing uses are raised by conveyances not operating by transmutation of possession, as such conveyances have only an equitable effect until the statute and use meet, a springing use may be limited by them at once : but where the conveyance is one which does operate by transmutation of possession, (as a feoffment, fine, recovery, or lease and release,) two objects must be attended to, first, to convey the estate according to the rules of common law ; secondly, to raise the

use out of the seisin created by the conveyance. Now, the common law does not admit of a freehold being limited to commence *in futuro*. (See *ante*, p. 143, and note.)

As to the third class, or *future* or *contingent* uses, where an estate is limited previously to a future use, and the future use is limited by way of remainder, it will be subject to the rules of common law, and, if the previous estate is not sufficient to support it, will be void. (See *ante*, p. 168, and note.)

Future uses have been countenanced, and springing uses restrained, by what is now a firm rule of law, namely, that if such a construction can be put upon a limitation in use, as that it *may* take effect by way of remainder, it shall never take effect as a springing use. (*Southcot v. Stowel*, 1 Mod. 226, 237 ; 2 Mod. 207 ; *Goodtitle v. Billington*, Dougl. 758.)

Resulting uses.

Revocation of uses.

riage the wife takes the whole use in severalty; and, upon the birth of a son, the use is executed jointly in them both (*t*). This is sometimes called a *secondary*, sometimes a *shifting* use. And, whenever the use limited by the deed expires, or cannot vest, it returns back to him who raised it, after such expiration, or during such impossibility, and is styled a *resulting* use. As, if a man makes a feoffment to the use of his intended wife for life, with remainder to the use of her first-born son in tail; here, till he marries, the use results back to himself; after marriage it is executed in the wife for life: and, if she dies without issue, the whole results back to him in fee (*u*). It was likewise held, that the uses originally declared may be revoked (53) at any future

(*t*) Bacon of Uses, 351.(*u*) Ibid. 350; 1 Rep. 120.

(53) Every shifting or secondary use which arises from the act of some person nominated in the deed, whereby the original limitations are created, must be a use arising from the execution of a *power*. All powers of this kind are, in their nature, powers of revocation and new appointment; for, the new uses and estates created under the appointment, must necessarily (to the extent of such appointment) revoke, defeat, or abridge the uses, which existed and were executed previously to the new limitation. (*Bingham's case*, Moor, 611; *Tarback v. Marbury*, 2 Vern. 511.) And it is not necessary that an express power of revocation should be limited prior to the power of appointing new uses: but, after the power of revocation and appointment of new uses has been once exercised, an express power of revocation or of new appointment, must be reserved in the deed appointing the new uses, otherwise the execution under the original power will be irrevocable.. (*Hele v. Bond*, decided in the House of Lords, upon the opinion of all the judges, reported in Prec. in Cha. 474, and cited in 2 Ves. sen. 77 & 211; as also in 2 Burr. 1148.)

A feoffment, or other conveyance, whereby the feoffee, grantee, &c., is in by the common law, cannot be made subject to a power of revocation: but powers to revoke uses were allowed before the statute of Hen. VIII., and that statute executing the possession *as the party had the use*, revocable estates may be created under the statute of uses. (Co. Litt. 237 a.)

Powers to raise new estates (which, as we have seen, must necessarily be, *pro tanto*, powers of revocation of the estates previously existing,) are technically described as either simply collateral, or not simply collateral but relating to the land, that is, limited to one that had, hath, or shall have, an estate or interest in the land. Powers of this last description are again subdivided into powers appendant, or annexed to the estate in the land, and powers in gross. A power is *appendant*, when it is given to, or reserved by, a man having an estate in the land, and the execution of the power falls within the compass of his estate; and unless it be executed during the continuance of that estate, it can never be executed. A power is *in gross*, where a man hath an estate and power of revocation, and the execution of

time, and new uses be declared of the land, provided the grantor reserved to himself such a power at the creation of the estate; whereas the utmost that the common law would

the power doth not fall within the compass of his estate; there the parting with his own estate only will not prevent the execution of the power. But if, by fine or feoffment, he absolutely passes the entire estate, and divests all remainders, the power of appointing new uses will be destroyed; as it may by releasing the power of appointment to the remainder-man. (*Edwards v. Slater*, Hardr. 415, 416; *Lampet's case*, 10 Rep. 48.)

It should be observed, that a fine or recovery, (or, it is presumed, one of the simpler assurances which have been substituted for fines and recoveries,) by a donee of a power will not necessarily, and in all cases, operate as a destruction of the power. That doctrine was, indeed, countenanced by the first decision of the case of *Herring v. Brown*; (1 Ventr. 368, 371;) but, from that judgment there was an appeal, and it was reversed, on the ground that the fine, and a deed subsequently executed declaring the uses of the fine, were but one conveyance, and both together were an execution, and not an extinguishment of the power. It was agreed, that a fine alone, without a deed declaring the uses, would have extinguished the power; but it was said not to be so where there was a deed to declare the intention of the parties at the time of levying the fine; and though the date of the deed in question was subsequent to the fine, yet that was for no other reason but because the fine ought to relate to the precedent term, though in truth it might be levied in the vacation, and so the deed might be executed at the same time the fine was acknowledged; therefore it would be unreasonable to make a forfeiture, or extinguishment of a right, merely by relation, which

is but *fictio juris*. (Carthew, 23, 24; Skinner, 187; and see *Doe v. Whitehead*, 2 Burr. 711, with *Tyrrell v. Marsh*, 3 Bing. 38; S. C. 10 Moore, 305; in which last mentioned case the final decision of *Herring v. Brown* was referred to, as a judgment consistent with justice, and confirmed by subsequent decisions.) However, Mr. Sugden (in the fifth section of the first chapter of his Treatise on Powers) cautions his readers (that is, every legal student,) not to suppose that the case of *Herring v. Brown*, decided, that a declaration of uses at any time after the fine would prevent the forfeiture, and operate as an execution of the power. Where it is recited in the deed declaring the uses, that the fine was, at the time of levying it, intended to enure to the uses expressed, it seems that no party to the deed, nor any one claiming under him, can insist upon the forfeiture; the deed would operate as an estoppel, as against such persons. (Carth. 24.) But, as against strangers, Mr. Sugden conceives, it would be left to a jury to say whether the fine was, or was not, levied to the uses subsequently declared. (*Bushell v. Burland*, Rep. temp. Holt, 736; S. C. 11 Mod. 197.)

A power of revocation and new appointment is simply collateral, where a man hath no present interest in the land, and by the revocation of the estate is not to take or dispose of any thing. In this case, a fine or feoffment of the land is no extinguishment of the power; for, under such a power, the interest must be claimed by a stranger, and no man is estopped from demanding his own right by the act of another, with whom he has no privity. (*Edwards v. Slater*, Hardr. 415; Sugden on Powers, ch. 1, sec. 4, p. 48.)

allow, was a deed of defeazance coeval with the grant itself, and therefore esteemed a part of it, upon events specifically mentioned (*w*). And, in case of such a revocation, the old uses were held instantly to cease, and the new ones to become executed in their stead (*x*). And this was permitted, partly to indulge the convenience, and partly the caprice, of mankind; who (as Lord Bacon observes (*y*)) have always affected to have the disposition of their property revocable in their own time, and irrevocable ever afterwards.

The courts of law held that no use could be limited on a use;

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By this equitable train of decisions in the courts of law, the power of the Court of Chancery over landed property was greatly curtailed and diminished. But one or two technical scruples, which the judges found it hard to get over, restored it with tenfold increase. They held, in the first place, that "no use could be limited on a use" (*z*), and that when a man bargains and sells his land for money, which raises a use by implication to the bargainee, the limitation of a farther use to another person is repugnant, and therefore *void (*a*). And therefore, on a feoffment to A. and his heirs, to the use of B. and his heirs, in trust for C. and his heirs, they held that the statute executed only the first use, and that the second was a mere nullity: not advert- ing, that the instant the first use was executed in B., he became seised to the use of C., which second use the statute might as well be permitted to execute as it did the first; and so the legal estate might be instantaneously transmitted down through a hundred uses upon uses, till finally executed in the last *cestuy que use* (54). Again; as the statute mentions only such persons as were *seised* to the use of others, this was held not to extend to terms of years, or other chattel interests, whereof the termor is not *seised*, but only *pos- sessed* (*b*); and therefore, if a term of one thousand years

that the statute did not extend to terms of years;

(*w*) See pag. 327.

(*x*) Co. Litt. 237.

(*y*) On Uses, 316.

(*z*) Dyer, 155.

(*a*) 1 And. 37, 136.

(*b*) Bacon Law of Uses, 335; Jenk. 244.

(54) Mr. Christian observes, that "it is the practice to introduce only the names of the trustee and the *cestui que trust*; the estate being conveyed to A. and his heirs, *to the use of A. and his heirs*, in trust for B. and his

heirs; and thus this important statute has been effectually repealed by the repetition of half a dozen words." [Per Lord Hardwicke, in *Hopkins v. Hopkins*, 1 Atk. 591.—ED.]

be limited to A., to the use of (or in trust for) B., the statute does not execute this use, but leaves it as at common law (c). And lastly, (by more modern resolutions,) where lands are given to one and his heirs, in trust to receive and pay over the profits to another, this use is not executed by the statute; for the land must remain in the trustee to enable him to perform the trust (d) (55).

nor to cases where the trustee was to receive and pay over the profits to another.

(c) Poph. 76; Dyer, 369.

(d) 1 Eq. Cas. Abr. 383, 384.

(55) Mr. Christian, in his note upon the text, says, "I should be inclined to think that the case as expressed by the learned judge would be construed an use executed by the statute. In the authority referred to in 1 Eq. Ca. Abr. 383, the trustees were first to pay legacies and annuities, and then to pay over the surplus to a married woman for her separate use. To prevent a trust from being executed by the statute in cases of this kind, it seems necessary that the trustees should have some control and discretion in the application of the profits of the estate, as to make repairs, or to provide for the maintenance of the *cestui que trust*. (1 Bro. 75; 2 T. R. 444.) Where there is no such special circumstances in the grant, it appears to be equivalent to a direction to the trustees to permit the *cestui que trust* to take the profits of the estate, which is fully established to be an use executed. (1 Eq. Ca. Abr. 383.)

"But if it is to permit a married woman to take the rents and profits for her separate use, the legal estate will be vested in the trustees, in order to prevent the husband from receiving them subject to no control. (7 T. R. 652.)" [*Doe v. Scott*, 4 Bing. 507; S. C. 1 Moo. & S. 317.]

[In *Swaine v. Burton*, (15 Ves. 365,) a devise was made to trustees, to the use of the said trustees and their heirs, which last words were said by Lord Eldon, (in *Hawkins v. Luscombe*, 2 Swanst. 392,) to be extremely important, to show that the legal estate vested in the trustees.

The rule is fully established, that, where there is any thing for the trustees to do, beyond merely paying money over, they take the legal estate: (*Tenny v. Moody*, 3 Bing. 8; S. C. 10 Moore, 252; *Silvester v. Wilson*, 2 T. R. 451;) it must be understood, however, that the legal estate remains vested in them, under a devise for particular purposes, so long only as the execution of the trust requires it, and no longer. (*Doe v. Nicholls*, 1 Barn. & Cress. 342; S. C. 2 D. & R. 488.) And where the purposes of the trust can be answered by a less estate than a fee-simple, it seems, a greater interest than is sufficient to answer such purposes, will not pass to the trustees; but the uses in remainder, limited after such less estate, will be executed by the statute. (*Doe v. Simpson*, 5 East, 171.) When devisees in trust are directed to receive and pay over the rents and profits, the seisin remains in them, and the estate is not executed in the *cestui que use*; (*Browne v. Ramsden*, 8 Taunt. 564; *Symson v. Turner*, 1 Eq. Ca. Ab. 383;) but, where lands are devised to trustees and their heirs on trust to permit A. to take the profits for his life, and afterwards to stand seised to the use of the heirs of A.'s body; this is a use executed in A. and he has an estate tail. (*Broughton v. Langley*, 2 Salk. 679.) It has been thought "miraculous how this distinction ever came to be established, since good sense requires that, in both cases equally, the estate should be vested in the trustee."

But the courts of equity held, that, though these were not *uses*, yet still they were *trusts* which in conscience ought to be performed.

Of the two more ancient distinctions the courts of equity quickly availed themselves. In the first case, it was evident that B. was never intended by the parties to have any beneficial interest; and, in the second, the *cestuy que use* of the term was expressly driven into the Court of Chancery to seek his remedy: and therefore that court determined, that, though these were not *uses* which the statute could execute, yet still they were *trusts* in equity, which in conscience ought to be performed (*e*). To this the reason of mankind assented, and the doctrine of *uses* was revived, under the denomination of *trusts*; and thus, by this strict construction of the courts of law, a statute made upon great deliberation, and introduced in the most solemn manner, has had little other effect than to make a slight alteration in the formal words of a conveyance (*f*).

And those courts now hold a trust-estate equivalent to the legal ownership.

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*However, the courts of equity, in the exercise of this new jurisdiction, have wisely avoided in a great degree those mischiefs which made *uses* intolerable (56). The statute of frauds, 29 Car. II. c. 3, having required that every declaration, assignment or grant of any trust in lands or hereditaments, (except such as arise from implication or construction of law,) shall be made in writing signed by the party, or by his written will; the courts now consider a trust estate (either when expressly declared, or resulting by such implication) as equivalent to the legal ownership, governed by the same rules of property, and liable to every charge in equity, which the other is subject to in law: and, by a long series of uniform determinations, for now near a century past, with some assistance from the legislature, they have raised a new system of rational jurisprudence, by which trusts are made to answer

(*e*) 1 Hal. P. C. 248.

(*f*) Vaugh. 50; Atk. 591.

But the learned Judge who made this objection, submitted to the rule, as one that had become inveterate. (*Doe v. Biggs*, 2 Taunt. 112.) This is extracted from 2 Hovenden's Supp. to Ves. jun. Rep. p. 412.—ED.]

(56) Lord Mansfield, (in *Burgess v. Wheate*, 1 W. Bla. 160,) said, "in my apprehension, trusts were not on a true foundation till Lord Nottingham held the great seal. By steadily pur-

suing, from plain principles, trusts in all their consequences, and by some assistance from the legislature, a noble, rational, and uniform system of law has been since raised. Trusts are made to answer the exigencies of families, and all proper purposes, without producing one inconvenience, fraud, or private mischief, which the statute of Hen. VIII. meant to avoid."

in general all the beneficial ends of uses, without their inconvenience or frauds. The trustee is considered as merely the instrument of conveyance, and can in no shape affect the estate, unless by alienation for a valuable consideration to a purchaser without notice (*g*); which, as *cestuy que trust* is generally in possession of the land, is a thing that can rarely happen. The trust will descend, may be aliened, is liable to debts, to executions on judgments, statutes, and recognizances, (by the express provision of the statute of frauds,) to forfeiture, to leases and other incumbrances, nay, even to the curtesy of the husband, as if it was an estate at law. It has not yet indeed been subjected to dower (57), more from a cautious adherence to some hasty precedents (*h*), than from any well-grounded principle (58). It hath also been held not liable to escheat to the lord, in consequence of attainder (59) or want of heirs (*i*): because the trust could never be intended for his benefit (60). But let us now return to the statute of uses.

The only service, as was before observed, to which this statute is now consigned, is in giving efficacy to certain new and secret species of conveyances; introduced in order to render transactions of this sort as private as possible, and to save the trouble of making livery of seisin, the only ancient

(*g*) 2 Freem. 43.

(*i*) Hardr. 494; *Burgess & Wheate*,

(*h*) 1 Chanc. Rep. 254; 2 P. Wms. Hil. 32 Geo. II. in Canc.
640.

(57) But see *ante*, p. 137, note.

stat. 3 & 4 Gul. IV. c. 106, s. 7.]

(58) Mr. Christian observes, that "it has been decided, that when the legal and equitable estates meet in the same person, the trust or equitable estate is merged in the legal estate; as, if a wife should have the legal estate and the husband the equitable, and if they have an only child, to whom these estates descend, and who dies intestate without issue, the two estates having united, the descent will follow the legal estate, and the estate will go to an heir on the part of a mother: and thus, which appears strange, the beneficial interest will pass out of one family into another, between whom there is no connexion by blood. (Doug. 741.)" [But see

"Before the statute of uses, there was neither dower nor tenancy by the curtesy of an use, p. 331. It is therefore an unaccountable inconsistency, that, since the statute, the husband should have curtesy of a trust estate, and that the wife should out of a similar estate be deprived of dower." [This anomaly is corrected by stat. 3 & 4 Gul. IV. c. 105, s. 2.]

(59) See *ante*, pp. 72, 252, and the notes thereto.

(60) The reason more usually assigned is, that escheat only takes place *for want of a tenant*. (See *Williams v. Lord Lonsdale*, 3 Ves. 753, and *ante*, chap. 15, pp. 244 *et seq.* with the notes thereto.)

conveyance of corporeal freeholds: the security and notoriety of which public investiture abundantly overpaid the labour of going to the land, or of sending an attorney in one's stead. But this now has given way to

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12. Covenants to stand seised to uses.

*12. A twelfth species of conveyance, called a *covenant to stand seised to uses*: by which a man seised of (61) lands, covenants in consideration of blood or marriage that he will stand seised of the same to the use of his child, wife, or kinsman; for life, in tail, or in fee. Here, the statute executes at once the estate; for the party intended to be benefited, having thus acquired the use, is thereby put at once into corporal possession of the land (*k*), without ever seeing it, by a kind of parliamentary magic. But this conveyance can only operate, when made upon such weighty and interesting considerations as those of blood (62) or marriage.

13. Bargain and sale.

13. A thirteenth species of conveyance, introduced by this statute, is that of a *bargain and sale* of lands; which is a kind of a real contract, whereby the bargainor for some pecuniary consideration bargains and sells, that is, contracts to convey, the land to the bargainee; and becomes by such a bargain a trustee for, or seised to the use of, the bargainee; and then the statute of uses completes the purchase (*l*); or, as it hath been well expressed (*m*), the bargain first vests the use, and then the statute vests the possession. But, as it was foreseen that conveyances, thus made, would want all those benefits of notoriety, which the old common law assurances were calculated to give; to prevent therefore clandestine conveyances of freeholds, it was enacted, in the same session of parliament, by statute 27 Hen. VIII. c. 16, that such bargains and sales should not enure to pass a freehold, unless the same be made by indenture, and en-

(*k*) Bacon, Use of the Law, 151.

(*l*) Ibid. 150.

(*m*) Cro. Jac. 696.

(61) The covenantor must be seised in possession, or entitled in remainder or reversion, at the time of the execution of the deed; because the use must arise out of the seisin, or right, which the covenantor has at the time. (*Yelverton v. Yelverton*, Cro. Eliz. 401.)

(62) Love and affection to an illegitimate child are not sufficient considerations to raise a use, in a covenant to stand seised. (*Gerrard v. Worsley*, Dyer, 374 a.) *A fortiori*, long acquaintance and familiar intercourse, are not sufficient to raise a use. (*Sharlington v. Strotton*, 1 Plowd. 302 a.)

lled within six months in one of the courts of Westminster-hall or with the *custos rotulorum* of the county. Clandestine bargains and sales of chattel interests, or leases for years, were thought not worth regarding, as such interests were very precarious, till about six years before (*n*); which also occasioned them to be overlooked in framing the statute of uses: and therefore such bargains and sales are not directed to be enrolled. But how impossible it is to *foresee, [* 339] and provide against, *all* the consequences of innovations! This omission has given rise to

14. A fourteenth species of conveyance, *viz.* by *lease and release*; first invented by Serjeant Moore (63), soon after the statute of uses, and now the most common of any, and therefore not to be shaken; though very great lawyers (as, particularly, Mr. Noy, Attorney-General to Charles I.) have formerly doubted its validity (*o*). It is thus contrived: A lease, or rather bargain and sale, upon some pecuniary consideration, for one year, is made by the tenant of the freehold to the lessee or bargainee. Now, this, without any enrolment, makes the bargainor stand seised to the use of the bargainee, and vests in the bargainee the *use* of the term for a year; and then the statute immediately annexes the *possession*. He therefore being thus in possession, is capable of receiving a release of the freehold and reversion; which, we have seen before (*p*), must be made to a tenant in possession: and, accordingly, the next day, a release is granted

14. Lease and release.

(*n*) See pag. 142.

(*o*) 2 Mod. 252.

(*p*) Pag. 324.

(63) Chief Justice North, (in *Bar-ker v. Keat*, 2 Mod. 251,) intimates, that, at common law, and before the statute of uses, when an inheritance was to be granted, a lease for years was usually made, and the lessee *entered*, and then the lessor released to him, and this was good. After the statute of uses, it became an opinion, that, if a lease for years was made upon a valuable consideration, a release might operate upon that *without* an actual *entry* of the lessee, because the statute did execute the lease, and raised a use presently to the lessee.

Sir Francis Moore was the first who practised this way. But, because there were some opinions that, where conveyances may enure two ways, the common law shall be preferred, unless it appear that the party intended it should pass by the statute, thereupon the usual course was to put the words "bargain and sale" into the lease for a year, to bring it within the statute, and to allege that the lease was made to the intent and purpose that, by the statute of uses, the lessee might be capable of a release.

to him (*q*). This is held to supply the place of livery or seisin : and so a conveyance by lease and release is said to amount to a feoffment (*r*).

15. Deeds to lead or declare uses.

15. To these may be added deeds to *lead* or *declare the uses* (64) of other more direct conveyances, as feoffments, fines, and recoveries ; of which we shall speak in the next chapter : and

16. Deeds of revocation of uses.

16. Deeds of *revocation of uses* ; hinted at in a former page (*s*), and founded in a previous power, reserved at the raising of the uses (*t*), to revoke such as were then declared ; and to appoint others in their stead, which is incident to the power of revocation (*u*). And this may suffice for a specimen of conveyances founded upon the statute of uses : and will finish our observations upon such deeds as serve to *transfer* real property.

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Of deeds to charge or discharge lands.

* Before we conclude, it will not be improper to subjoin a few remarks upon such deeds as are used not to *convey*, but to *charge* or *incumber*, lands, and to *discharge* them again : of which nature are, *obligations* or bonds, *recognizances*, and *defeazances* upon them both.

1. Obligations.

1. An *obligation* or bond, is a deed (*v*) whereby the obligor obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to another at a day appointed. If this be all, the bond is called a single one, *simplex obligatio* : but there is generally a condition added, that, if the obligor does some particular act, the obligation shall be void, or else shall remain in full force : as, payment of rent ; performance of covenants in a deed ; or repayment of a principal sum of money borrowed of the obligee, with interest, which principal sum is usually one-half of the penal sum specified in the bond. In case this condition is not performed, the bond becomes forfeited, or absolute, at law, and charges the obligor, while living ; and after his death the obligation descends upon his heir, who (on defect of personal assets) is bound to discharge it, provided he has real assets

(*q*) See Appendix, No. II. s. 1, 2.

(*u*) Co. Litt. 237.

(*r*) Co. Litt. 270 ; Cro. Jac. 604.

(*v*) See Appendix, No. III. pag.

(*s*) Pag. 335.

xiii.

(*t*) See Appendix, No. II. pag. xi.

by descent as a recompence. So that it may be called, though not a *direct*, yet a *collateral*, charge upon the lands (65). How it affects the personal property of the obligor, will be more properly considered hereafter.

If the condition of a bond be impossible at the time of making it, or be to do a thing contrary to some rule of law that is merely positive, or be uncertain, or insensible, the condition alone is void, and the bond shall stand single, and unconditional : for it is the folly of the obligor to enter into such an obligation, from which he can never be released. If it be to do a thing that is *malum in se*, the obligation itself is void (66) : for the whole is an unlawful contract, and the ob-

How a bond or its condition may be avoided.

(65) Mr. Christian observes, that "if in a bond the obligor *binds himself*, without adding his *heirs, executors, and administrators*, the executors and administrators are bound, but not the heir. (Shep. Touch. 369.) A bond does not seem properly to be called an incumbrance upon land; for it does not follow the land like a recognizance and a judgment; and if the heir at law alienes the land, the obligee in the bond, by which the heir is bound, can have his remedy only against the person of the heir to the amount of the value of the land; but he cannot follow it when it is in the possession of a *bond fide* purchasor. (Bull. N. P. 175.)"

[By the statute of 11 Geo. IV. & 1 Gul. IV. c. 47, creditors are enabled to maintain actions of debt or covenant, against the heirs, or devisees, of their obligors, or covenantors; and though such heirs, or devisees, may have aliened the lands or hereditaments descended or devised to them, before process sued out against them, they shall be answerable for the covenants and specialty debts of their ancestors or devisors, to the value of the land so descended or devised. The statute of 3 & 4 Gul. IV. c. 104, makes all freehold and copyhold estates assets for the payment of debts. See *ante*, p. 260 n.—ED.]

(66) As a general rule, a deed *pro turpi causâ* cannot be supported in equity; (see, however, *Casey v. Stafford*, 3 Swanst. 429;) nor, if the consideration appears on the face of the deed, at common law. (*Walker v. Perkins*, 3 Burr. 1569; *Gray v. Mathias*, 5 Ves. 293; *Franco v. Bolton*, 3 Ves. 371.) But, except in behalf of creditors, (*Mortimer v. Davies*, cited in 10 Ves. 363,) property of which a woman has obtained actual possession, will not be taken out of her hands; though, (even in favour of the grantor's representatives,) she might be restrained from bringing an action to enforce securities, founded only on an immoral consideration: (*Rider v. Kidder*, 10 Ves. 366; *Whalley v. Norton*, 1 Vern. 483:) *a fortiori* she could not maintain an action upon, or obtain specific performance of, a written promise for which the only consideration was a previous adulterous intercourse or concubinage. (*Matthews v. L—e*, 1 Mad. 565; *Binnington v. Wallace*, 4 Barn. & Ald. 652. See, however, *Gibson v. Dickie*, 3 Mau. & Sel. 461.) But, where a bond, or other deed, is executed, not as a bargain for future immorality, but as the *præmium pudicitie*, courts of equity will lend their assistance to enforce the security. (*Knye v. Moore*, 1 Sim. & Stu.

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ligee shall take no advantage from such a transaction. And if the condition be possible at the time of making it, and afterwards *becomes impossible, by the act of God, the act of law, or the act of the obligee himself, there the penalty of the obligation is saved ; for no prudence or foresight of the obligor could guard against such a contingency (*w*). On the forfeiture of a bond, or its becoming single, the whole penalty was formerly recoverable at law : but here the courts of equity interposed, and would not permit a man to take more than in conscience he ought ; *viz.* his principal, interest, and expenses, in case the forfeiture accrued by non-payment of money borrowed ; the damages sustained, upon non-performance of covenants ; and the like. And the like practice having gained some footing in the courts of law (*x*), the statute 4 & 5 Ann. c. 16, at length enacted, in the same spirit of equity, that, in case of a bond conditioned for the payment of money, the payment or tender of the principal sum due, with interest and costs, even though the bond be forfeited and a suit commenced thereon, shall be a full satisfaction and discharge (67).

(*w*) Co. Litt. 206. (*x*) 2 Keb. 553, 555 ; Salk. 596, 597 ; 6 Mod. 11, 60, 101.

65 ; *S. C.* 2 Sim. & Stu. 260 ; *Spicer v. Hayward*, Prec. in Cha. 115 ; *Cray v. Rooke*, Ca. temp. Talb. 155 ; *Marchioness of Annandale v. Harris*, 2 P. Wms. 433.) A bond, however, though given as the *præmium pudicitie*, cannot be proved as a debt, should the obligor become bankrupt. (*Gilham v. Locke*, 9 Ves. 614 ; *Ex parte Ward*, cited 15 Ves. 290 ; *Turner v. Vaughan*, 2 Wils. 340.)

(67) In the case of *Lonsdale v. Church*, (2 T. R. 389,) Mr. Justice Buller inclined to hold, that, on a bond, damages might be recovered beyond the penalty. But, in *Wilde v. Clarkson*, (6 T. R. 304,) Lord Kenyon, C. J. overruled the opinion of Justice Buller, and said, “in actions on bonds, or on any penal sums, for performance of contracts, &c., the act of parliament expressly says, that there shall be judgment for the pe-

nalty, and the judgment shall stand as a security for further breaches ; but the obligor is not answerable, in the whole, for more than the amount of the penalty.” However, in the subsequent case of *M^cClure v. Dunkin*, (1 East, 438,) where an action was brought on a judgment recovered on a bond, Lord Kenyon held, that interest on the judgment might be recovered in damages, beyond the penalty of the bond. This distinction was taken, that, in an action on the bond itself, interest could not have been recovered beyond the penalty ; but that, after the judgment, the bond became merged in another security, on which interest might by law accrue without any such limitation. (See *Moore v. M^cNamara*, 1 Ball & Beat. 310.)

Analogous rules prevail in equity, where, generally speaking, interest on a bond is not allowed beyond the

2. A *recognizance* is an obligation of record, which a man enters into before some court of record, or magistrate duly authorised (*y*), with condition to do some particular act; as, to appear at the assizes, to keep the peace, to pay a debt, or the like. It is in most respects like another bond: the difference being chiefly this, that the bond is the creation of a fresh debt or obligation *de novo*, the recognizance is an acknowledgment of a former debt upon record; the form whereof is, "that A. B. doth acknowledge to owe to our lord the king, to the plaintiff, to C. D., or the like, the sum of ten pounds;" with condition to be void on performance of the thing stipulated: in which case the king, the plaintiff, C. D., &c., is called the cognizee, "*is cui cognoscitur*;" as he that enters into the recognizance is called the cognizor, "*is qui cognoscit*." This being either certified to, or taken by the officer of some court, is witnessed only by the record of that court, and not by the party's seal: so that it is not in strict propriety a deed, though the effects of it are greater than a *common obligation; being allowed a priority in point of payment (68), and binding the lands of the cognizor, from the time of enrolment on record (*z*) (69). There are also other

2. Recognizances.

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(*y*) Bro. Abr. tit. Recognizance, 24.

(*z*) Stat. 29 Car. II. c. 3. See pag. 161.

penalty of the bond. (*Mackworth v. Thomas*, 5 Ves. 331; *Clarke v. Seton*, 6 Ves. 414.) But, where the creditor has been kept out of his money by an injunction, (*Hale v. Thomas*, 1 Vern. 329,) or other proceeding by which he has been prevented from going on at law, (*Duvall v. Terry*, Show. P.C. 16,) it is only reasonable that he should be allowed all interest accumulated by delays so occasioned: (*Pulteney v. Warren*, 6 Ves. 92:) whenever a party is prevented, by an order of a court of equity, from proceeding to establish his rights at law, it is the duty of the court to take care that no injury shall arise to him in consequence of such interference. (*O'Donel v. Browne*, 1 Ball & Beat. 263; *Bond v. Hopkins*, 1 Sch. & Lef. 441.)

(68) A recognizance has priority in point of payment, over a common obligation; but a judgment, or decree, (not being a mere interlocutory decree,) takes place of a recognizance. (*Littleton v. Hibbins*, Cro. Eliz. 793; *Searle v. Lane*, 2 Freem. 104; *S. C.* 2 Vern. 89; *Perry v. Phelps*, 10 Ves. 34.) Between decrees and judgments, the right to priority of payment is determined by their real priority of date, without regard to the legal fiction of relation to the first day of Term. (*Darston v. Earl of Oxford*, 3 P. Wms. 401, n.; *Joseph v. Mott*, Prec. in Cha. 79; *Morrice v. Bank of England*, 3 Swanst. 577.)

(69) A recognizance not enrolled will be considered as an obligation, or bond, only; but, being sealed and acknowledged, must be paid as a debt

recognizances, of a private kind, *in nature of a statute staple*, by virtue of the statute 23 Hen. VIII. c. 6, which have been already explained (*a*), and shewn to be a charge upon real property.

3. Defeazances.

3. A defeazance, on a bond, or recognizance, or judgment recovered, is a condition, which, when performed, defeats or undoes it, in the same manner as a defeazance of an estate before mentioned. It differs only from the common condition of a bond, in that the one is always inserted in the deed or bond itself, the other is made between the same parties by a separate, and frequently a subsequent deed (*b*) (70). This, like the condition of a bond, when performed, discharges and disincumbers the estate of the obligor.

Conclusion.

These are the principal species of deeds or matter *in pais*, by which estates may be either conveyed, or at least affected. Among which the conveyances to uses are by much the most frequent of any: though, in these, there is certainly one palpable defect, the want of sufficient notoriety; so that purchasers or creditors cannot know with any absolute certainty, what the estate, and the title to it, in reality are, upon which they are to lay out or to lend their money. In the ancient feudal method of conveyance (by giving corporal seisin of the lands), this notoriety was in some measure answered; but, all the advantages resulting from thence are now totally defeated by the introduction of death-bed devises and secret conveyances: and there has never been yet any sufficient guard provided against fraudulent charges and incumbrances, since the disuse of the old Saxon custom of transacting all conveyances at the county-court, and entering a memorial of them in the chartulary or leger-book of some adjacent monastery (*c*), and the failure of the general register established

(*a*) See pag. 160.

(*b*) Co. Litt. 237; 2 Saund. 47.

(*c*) Hickes, Dissertat. Epistolar. 9.

by specialty. (*Bothomly v. Lord Fairfax*, 1 P. Wms. 340; *S. C.* 2 Vern. 751.) If enrolment is allowed by special order, after the proper time has elapsed, this, for most purposes, makes the recognizance effectual from the time of its date; but, should the cognizor between the date and the

enrolment of the recognizance, have borrowed money on a judgment, the judgment-creditor will be allowed a preference. (*Fothergill v. Kendrick*, 2 Vern. 234.)

(70) See *ante*, p. 327, and the note thereto.

by King Richard the first, for the starrs or mortgages made to *Jews, in the *capitula de Judæis*, of which Hoveden [* 343] has preserved a copy. How far the establishment of a like general register, for deeds, and wills, and other acts affecting real property, would remedy this inconvenience, deserves to be well considered. In Scotland, every act and event regarding the transmission of property, is regularly entered on record (*d*). And some of our own provincial divisions, particularly the extended county of York, and the populous county of Middlesex, have prevailed with the legislature (*e*) to erect such registers in their several districts. But, however plausible these provisions may appear in theory, it hath been doubted (71) by very competent judges, whether more disputes have not arisen in those counties by the inattention and omission of parties, than prevented by the use of registers (72).

(*d*) Dalrymple on Feodal Property, 262, &c.

(*e*) Stat. 2 & 3 Ann. c. 4; 6 Ann. c. 35; 7 Ann. c. 20; 8 Geo. II. c. 6.

(71) But these doubts have been met by very confident opinions in favour of general registration; and, it is believed, the propriety of such a measure has been strongly pressed upon the notice of the commissioners to whom a consideration of the present state of the laws of real property, and of the improvements of which the system is susceptible, has been referred.

(72) Mr. Christian observes, that "by the register-acts, a registered deed shall be preferred to a prior unregistered deed; yet, it has been decreed by Lord Hardwicke, if the subsequent purchaser by the registered deed had previous notice of the unregistered one, he shall not avail himself of his deed, but the first purchaser shall be preferred. (1 Ves. sen. 64.)"

[The legislature has been understood by our courts, not to have meant, that (the form of registration being unobserved) actual notice of an incumbrance on an estate should not bind a purchaser. (*Davis v. Earl of Strathmore*, 16 Ves. 430; *Le Neve v. Le*

Neve, 3 Atk. 650; *Bushell v. Bushell*, 1 Sch. & Lef. 100; *Doe v. Allsop*, 5 Barn. & Ald. 147.) The French courts adhered much more rigidly to the letter of their old code respecting registration, and held, that a creditor or purchaser might plead want of registration, in bar of a prior incumbrance, though such creditor or purchaser had full notice of the prior incumbrance, before he made his own contract or purchase. They thought, that, to admit a contrary doctrine would leave it always open to argument, whether sufficient notice had, or had not, been received; and that this would lead to endless uncertainty, confusion, and perjury; therefore, that it was much better the right of the subject should depend upon certain and fixed principles of law, than upon rules and constructions of equity. They decided, consequently, that nothing, not even the most actual and direct notice, should countervail the want of registration. (See Mr. Hargrave's note to Co. Litt. 290 b.) With us, it has been

much doubted, whether our courts ought ever to have suffered the question of notice to be agitated, as against a party who has duly registered his conveyance. (*Wyatt v. Barwell*, 19 Ves. 439.)

[But as the law at present stands, registration of an *equitable* mortgage, or other incumbrance upon lands situated in a register county, is clearly not, of itself, presumptive notice to a subsequent *legal* mortgagee, so as to take from him his legal advantage. (*Morecock v. Dickens*, Ambl. 680; *Bedford v. Bacchus*, 2 Eq. Ca. Ab. 615; *Hodgson v. Dean*, 2 Sim. & Stu. 224.) Nor will registration of a mortgage of the equity of redemption preclude a third mortgagee from tacking that incumbrance, if he has bought in the first mortgage; provided he had not notice of the second mortgage, when he lent his money. (*Cator v.*

Cooley, 1 Cox, 182.) And an equitable mortgagee will not be compelled to deliver up the title deeds deposited with him, but will be entitled to the benefit thereof, as against a prior legal mortgagee, whose mortgage has been duly registered, but notice of which registration is not brought home to the equitable mortgagee; (*Wiseman v. Westland*, 1 Younge & Jerv. 121;) for, it is settled, (though the soundness of the doctrine, as we have seen, is questionable,) that the registry of a deed does not, of itself, amount to constructive notice. (*Cator v. Cooley*, 1 Cox, 182; *Jolland v. Stainbridge*, 3 Ves. 485; *Pentland v. Stokes*, 2 Ball & Beat. 75; *Bushell v. Bushell*, 1 Sch. & Lef. 97, 103; *Latouche v. Dunsany*, 1 Sch. & Lef. 157; *Underwood v. Courtown*, 2 Sch. & Lef. 64; *Hodgson v. Dean*, 2 Sim. & Stu. 225.) —ED.]

CHAPTER XXI.

OF ALIENATION BY MATTER OF RECORD.

ASSURANCES by *matter of record* are such as do not entirely depend on the act or consent of the parties themselves: but the sanction of a court of record is called in to substantiate, preserve, and be a perpetual testimony of the transfer of property from one man to another (1); or of its establishment, when already transferred. Of this nature are, 1. Private acts of parliament. 2. The king's grants. 3. Fines. 4. Common recoveries.

I. Private *acts of parliament* are, especially of late years, become a very common mode of assurance. For it may sometimes happen, that, by the ingenuity of some, and the blunders of other practitioners, an estate is most grievously entangled by a multitude of contingent remainders, resulting trusts, springing uses, executory devises, and the like artificial contrivances (a confusion unknown to the simple conveyances of the common law); so that it is out of the power of either the courts of law or equity to relieve the owner. Or it may sometimes happen, that, by the strictness or omissions of family-settlements, the tenant of the estate is abridged of some reasonable power, (as, letting leases, making a jointure for a wife, or the like,) which power cannot be given him by the ordinary judges either in common law or equity. Or, it may be necessary, in settling an estate, to secure it against the claims of infants or other per-

(1) As a bargain and sale of an estate of inheritance, or of freehold, and a recognizance, require enrolment, they are, in some sort, according to our author's definition, assurances *by matter of record*, requiring the sanction of a court of record to their perfection.

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sons under legal disabilities, who are not bound by any judgments or decrees of the ordinary courts of justice. In these, or other cases of *the like kind, the transcendent power of parliament is called in, to cut the Gordian knot; and by a particular law, enacted for this very purpose, to unfetter an estate; to give its tenant reasonable powers; or to assure it to a purchasor, against the remote or latent claims of infants or disabled persons, by settling a proper equivalent in proportion to the interest so barred. This practice was carried to a great length in the year succeeding the restoration; by setting aside many conveyances alleged to have been made by constraint, or in order to screen the estates from being forfeited during the usurpation. And at last it proceeded so far, that, as the noble historian expresses it (*a*), every man had raised an equity in his own imagination, that he thought was entitled to prevail against any descent, testament, or act of law, and to find relief in parliament: which occasioned the king, at the close of the session to remark (*b*), that the good old rules of law are the best security; and to wish, that men might not have too much cause to fear, that the settlements which they make of their estates, shall be too easily unsettled when they are dead, by the power of parliament.

Of the requisites
for obtaining an
act of parliament.

Acts of this kind, are, however, at present carried on, in both houses, with great deliberation and caution; particularly in the house of lords, they are usually referred to two judges to examine and report the facts alleged, and to settle all technical forms (2). Nothing, also, is done without the consent, expressly given, of all parties in being, and capable of consent, that have the remotest interest in the matter; unless such consent shall appear to be perversely and without any reason withheld. And, as was before hinted, an equivalent in money or other estate is usually settled upon infants, or persons not *in esse*, or not of capacity to act for themselves, who are to be concluded by this act. And a general saving is constantly added, at the close of the bill, of the right and interest of all persons whatsoever, except those whose consent is so given or purchased, and who are

(*a*) Lord Clar. Contin. 162.

(*b*) Ibid. 163.

(2) See Vol. IV. p. 4.

therein particularly named: though it hath been holden, that even if such saving be omitted, the act shall bind none but the parties (*c*).

*A law, thus made, though it binds all parties to the bill, [* 346] is yet looked upon rather as a private conveyance, than as the solemn act of the legislature. It is not, therefore, allowed to be a *public*, but a mere *private* statute; it is not printed or published among the other laws of the session; it hath been relieved against, when obtained upon fraudulent suggestions (*d*); it hath been holden to be void, if contrary to law and reason (*e*); and no judge or jury is bound to take notice of it, unless the same be specially set forth and pleaded to them. It remains, however, enrolled (3) among the public records of the nation, to be for ever preserved as a perpetual testimony of the conveyance or assurance so made or established.

Relief may be had against private acts when obtained by fraud; and the courts are not bound to take notice of them, unless specially pleaded.

II. The *king's grants* are also matter of public record. For, as St. Germyn says (*f*), the king's excellency is so high in the law, that no freehold may be given to the king, nor derived from him, but by matter of record. And to this end a variety of offices are erected, communicating in a regular subordination one with another, through which all the king's grants must pass, and be transcribed, and enrolled; that the same may be narrowly inspected by his officers, who will inform him if any thing contained therein is improper or unlawful to be granted. These grants, whether of lands, honours, liberties, franchises, or aught besides (4), are contained in charters, or letters *patent*, that is, open letters, *literæ patentæ*: so called because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom; and are usually directed or

II. The king's grants, or letters patent.

(*c*) Co. 138; Godb. 171.

Dom. Proc. 13 Mar. 1754.

(*d*) *Richardson v. Hamilton*, Canc.

(*e*) 4 Rep. 12.

8 Jan. 1733; *M'Kenzie v. Stuart*,

(*f*) Dr. & Stud. b. 1, d. 8.

(3) General acts are enrolled by the clerk of the parliament, and delivered to the Chancery, which enrolment in the Chancery makes the original record. Private bills are not enrolled without special suit; but the original bill, with the assent of the Lords and Commons, and the Royal

assent, indorsed, and filed and labelled with the other bills to which the great seal is annexed, constitutes the original record, and remains with the clerk of the parliament. (Comyn's Dig. Parliament, R. 3.)

(4) As to patents for new inventions, see *post*, p. 407, n.

addressed by the king to all his subjects at large. And therein they differ from certain other letters of the king, sealed also with his great seal, but directed to particular persons, and for particular purposes : which, therefore, not being proper for public inspection, are closed up and sealed on the outside, and are thereupon called writs *close*, *literæ clausæ*, and are recorded in the *close-rolls*, in the same manner as the others are in the *patent-rolls*.

Practice as to
the passing of
grants or letters
patent.

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Grants, or letters patent, must first pass by *bill*: which is prepared by the attorney and solicitor-general, in consequence *of a warrant from the crown ; and is then signed, that is, superscribed at the top, with the king's own *sign manual*, and sealed with his *privy signet*, which is always in the custody of the principal secretary of state ; and then sometimes it immediately passes under the great seal, in which case the patent is subscribed in these words, "*per ipsum regem*, by the king himself" (*g*). Otherwise, the course is to carry an extract of the bill to the keeper of the *privy seal*, who makes out a writ or warrant thereupon to the Chancery ; so that the sign manual is the warrant to the privy seal, and the privy seal is the warrant to the great seal : and in this last case the patent is subscribed, "*per breve de privato sigillo*, by writ of privy seal" (*h*). But there are some grants, which only pass through certain offices, as the admiralty or treasury, in consequence of a *sign manual*, without the confirmation of either the *signet*, the *great*, or the *privy seal*.

Mode of construction observed as to grants by the king.

The *manner* of granting by the king does not more differ from that by a subject, than the *construction* of his grants, when made. 1. A grant made by the king, *at the suit of the grantee*, shall be taken most beneficially *for* the king, and *against* the party (5) : whereas the grant of a subject is construed most strongly *against the grantor*. Wherefore, it is usual to insert in the king's grants, that they are made, not at the suit of the grantee, but "*ex speciali gratia*, "*certa scientia et mero motu regis* ;" and then they have a more liberal construction (*i*). 2. A subject's grant shall be construed to include many things besides what are ex-

(*g*) 9 Rep. 18.

(*h*) Ibid. ; 2 Inst. 555.

(*i*) Finch, L. 100 ; 10 Rep. 112.

(5) See *ante*, pp. 18 & 22, with the notes.

pressed, if necessary for the operation of the grant. Therefore, in a private grant of the profits of land for one year, free ingress, egress, and regress, to cut and carry away those profits, are also inclusively granted (*k*): and if a feoffment of land was made by a lord to his villein, this operated as a manumission (*l*); for he was otherwise unable to hold it. But the king's grant shall not enure to any other intent than that which is precisely expressed in the grant. As, if he grants land to an alien, it operates nothing; for *such grant shall not also enure to make him a denizen, that [* 348] so he may be capable of taking by grant (*m*). 3. When it appears, from the face of the grant, that the king is mistaken, or deceived, either in matter of fact or matter of law, as in case of false suggestion, misinformation, or misrecital of former grants; or if his own title to the thing granted be different from what he supposes; or if the grant be informal; or if he grants an estate contrary to the rules of law; in any of these cases the grant is absolutely void (*k*) (6). For instance, if the king grants lands to one and his *heirs male*, this is merely void: for it shall not be an estate-tail, because there want words of procreation, to ascertain the body out of which the heirs shall issue: neither is it a fee-simple, as in common grants it would be; because it may reasonably be supposed, that the king meant to give no more than an estate-tail (*l*): the grantee is therefore (if any thing) nothing more than tenant at will (*m*). And to prevent deceits of the king, with regard to the value of the estate granted, it is particularly provided by the statute 1 Hen. IV. c. 6, that no grant of his shall be good, unless in the grantee's petition for them, express mention be made of the real value of the lands.

III. We are next to consider a very usual species of assurance, which is also of record, *viz.* a *fine* of lands and tenements. In which it will be necessary to explain, 1. The

III. Fines of lands and tenements.

(*k*) Co. Litt. 56.

(*l*) Finch, 101, 102.

(*l*) Litt. s. 206.

(*m*) Bro. Abr. tit. *Estates*, 34;

(*m*) Bro. Abr. tit. *Patent*, 62; Finch, L. 110.

Tit. *Patents*, 104; Dyer, 270; Dav. 45.

(*k*) Freem. 172.

(6) See Vol. III. p. 47.

nature of a fine; 2. Its several *kinds*; and 3. Its *force* and *effect* (7).

1. Of the nature of fines.

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1. A fine is sometimes said to be a feoffment of record (*n*): though it might with more accuracy be called an acknowledgment of a feoffment on record. By which is to be understood, that it has at least the same force and effect with a feoffment, in the conveying and assuring of lands: though it is one of those methods of transferring estates of freehold by the common law, in which livery of seisin is not necessary *to be actually given; the supposition and acknowledgment thereof in a court of record, however fictitious, inducing an equal notoriety. But, more particularly, a fine may be described to be an amicable composition or agreement of a suit, either actual or fictitious, by leave of the king or his justices: whereby the lands in question become, or are acknowledged to be, the right of one of the parties (*o*). In its original it was founded on an actual suit, commenced at law for recovery of the possession of land or other hereditaments; and the possession thus gained by such composition was found to be so sure and effectual, that fictitious actions were, and continue to be, every day commenced, for the sake of obtaining the same security.

Their use and antiquity.

A fine is so called because it puts an *end*, not only to the suit thus commenced, but also to all other suits and controversies concerning the same matter. Or, as it is expressed in an ancient record of parliament (*p*), 18 Edw. I. “*Non in regno Angliæ providetur, vel est, aliqua securitas*

(*n*) Co. Litt. 50.

(*o*) Ibid. 120.

(*p*) 2 Roll. Abr. 13.

(7) Our author's explanation is too complete and precise to need annotation; more particularly as there is reason to hope that much of the technicality, which now clogs every assurance by fine, will be got rid of; and a simpler mode of effecting the same purposes will be adopted. The question is under the consideration of the commissioners of inquiry into the law of real property; and there can be little cause to fear that they will recommend the legislature pertinaciously to adhere to forms, of which

the basis is the judicial record of a falsehood, and the details are, many of them, tedious, expensive, and liable to fatal mistakes. See *post*, the note to p. 357. Since this note was first published, the law in this respect has been improved by the statute of 3 & 4 Gul. IV. c. 74, which abolishes fines, and substitutes more simple modes of assurance. The text, therefore, is no longer of use in modern practice, as to the form of proceeding.

“ *major vel solennior, per quam aliquis statum certiore
 “ habere possit, neque ad statum suum verificandum aliquod
 “ solennius testimonium producere, quam finem in curia
 “ domini regis levatum: qui quidem finis sic vocatur, eo
 “ quod finis et consummatio omnium placitorum esse debet,
 “ et hac de causâ providebatur.*” Fines, indeed, are of equal
 antiquity with the first rudiments of the law itself; are
 spoken of by Glanvil (*q*) and Bracton (*r*) in the reigns of
 Henry II. and Henry III., as things then well known and
 long established; and instances have been produced of them
 even prior to the Norman invasion (*s*). So that the statute
 18 Edw. I., called *modus levandi fines*, did not give them
 original, but only declared and regulated the manner in
 which they should be levied, or carried on. And that is as
 follows:

1. The party to whom the land is to be conveyed or as-
 sured, commences an action or suit at law against the other,
 *generally an action of covenant (*t*), by suing out a writ or [* 350]
præcipe, called a writ of covenant (*v*) (8): the foundation The *præcipe*.
 of which is a supposed agreement or covenant, that the one
 shall convey the lands to the other; on the breach of which
 agreement the action is brought. On this writ there is
 due to the king, by ancient prerogative, a *primer fine*, or a
 noble for every five marks of land sued for; that is, one-
 tenth of the annual value (*u*). The suit being thus com-
 menced, then follows,

2. The *licentia concordandi*, or leave to agree the suit (*w*). The *licentia*
concordandi.
 For, as soon as the action is brought, the defendant, know-
 ing himself to be in the wrong, is supposed to make over-
 tures of peace and accommodation to the plaintiff. Who,
 accepting them, but having, upon suing out the writ, given

(*q*) L. 8, c. 1.

(*r*) L. 5, t. 5, c. 28.

(*s*) Plowd. 369.

(*t*) A fine may also be levied on a
 writ of *mesne*, of *warrantia chartæ*,
 or *de consuetudinibus et servitiis*.
 (Finch, L. 278.)

(*v*) See Appendix, No. IV. s. 1.

(*u*) 2 Inst. 511.

(*w*) Appendix, No. IV. s. 2. In
 the times of strict feudal jurisdiction,
 if a vassal had commenced a suit in
 the lord's court, he could not abandon
 it without leave; lest the lord should
 be deprived of his perquisites for de-
 ciding the cause. (Robertson's Cha.
 V. i. 31.)

(8) Writs of covenant real are abolished by stat. 2 & 3 Gul. IV. c. 27, s. 36.

pledges to prosecute his suit, which he endangers if he now deserts it without license, he therefore applies to the court for leave to make the matter up. This leave is readily granted, but for it there is also another fine due to the king by his prerogative, which is an ancient revenue of the crown, and is called the *king's silver*, or sometimes the *post fine*, with respect to the *primer fine* before-mentioned. And it is as much as the *primer fine*, and half as much more, or ten shillings for every five marks of land; that is, threewentieths of the supposed annual value (*x*).

The concord.

[*351] 3. Next comes the *concord*, or agreement itself (*y*), after leave obtained from the court: which is usually an acknowledgment from the deforciant (or those who keep the other out of possession) that the lands in question are the right of the complainant. And from this acknowledgment, or recognition of right, the party levying the fine is called the **cognizor*, and he to whom it is levied, the *cognizee*. This acknowledgment must be made either openly in the court of Common Pleas, or before the lord chief justice of that court, or else before one of the judges of that court, or two or more commissioners in the country, empowered by a special authority called a writ of *dedimus potestatem*; which judges and commissioners are bound by statute 18 Edw. I. st. 4, to take care that the cognizors be of full age, sound memory, and out of prison. If there be any feme covert among the cognizors, she is privately examined whether she does it willingly and freely, or by compulsion of her husband.

If the cognizor die after the return of the writ, and the acknowledgment of the fine, the fine may still be completed.

The note of the fine.

By these acts all the essential parts of a fine are completed: and, if the cognizor dies the next moment after the fine is acknowledged, provided it be subsequent to the day on which the writ is made returnable (*z*), still the fine shall be carried on in all its remaining parts: of which the next is, 4. The *note* of the fine (*a*); which is only an abstract of the writ of covenant, and the concord; naming the parties, the parcels of land, and the agreement. This must be enrolled of record in the proper office, by direction of the statute 5 Hen. IV. c. 14.

(*x*) 5 Rep. 39; 2 Inst. 511; Stat. 32 Geo. II. c. 14.

(*y*) Appendix, No. IV. s. 3.

(*z*) Comb. 71.

(*a*) Appendix, No. IV. s. 4.

5. The fifth part is the *foot* of the fine, or conclusion of it: which includes the whole matter, reciting the parties, day, year, and place, and before whom it was acknowledged or levied (*b*). Of this there are indentures made, or engrossed, at the chirographer's office, and delivered to the cognizor and the cognizee; usually beginning thus, "*hæc est finalis concordia*, this is the final agreement," and then reciting the whole proceeding at length. And thus the fine is completely levied at common law.

The *foot* or conclusion.

By several statutes still more solemnities are superadded, in order to render the fine more universally public, and less liable to be levied by fraud or covin. And, first, by 27 Edw. I. *c. 1, the note of the fine shall be openly read in the court of Common Pleas, at two several days in one week, and during such reading all pleas shall cease. By 5 Hen. IV. c. 14, and 23 Eliz. c. 3, all the proceedings on fines, either at the time of acknowledgment, or previous, or subsequent thereto, shall be enrolled of record in the court of Common Pleas. By 1 Ric. III. c. 7, confirmed and enforced by 4 Hen. VII. c. 24, the fine, after engrossment, shall be openly read and proclaimed in court (during which all pleas shall cease) sixteen times; viz. four times in the term in which it is made, and four times in each of the three succeeding terms; which is reduced to once in each term by 31 Eliz. c. 2; and these proclamations are indorsed on the back of the record (*c*). It is also enacted by 23 Eliz. c. 3, that the chirographer of fines shall every term write out a table of the fines levied in each county in that term, and shall affix them in some open part of the court of Common Pleas all the next term; and shall also deliver the contents of such table to the sheriff of every county, who shall, at the next assizes, fix the same in some open place in the court, for the more public notoriety of the fine.

Other requisites in the levying of fines, imposed by statute, for the prevention of fraud.

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2. Fines, thus levied, are of four kinds: 1. What in our law French is called a fine "*sur cognizance de droit, come ceo que il ad de son done*;" or, a fine upon acknowledgment of the right of the cognizee, as that which he hath of the gift of the cognizor (*d*). This is the best and surest kind

2. Of the several kinds of fines.

Sur cognizance de droit, come ceo, &c.

(*b*) Appendix, No. IV. s. 5.

(*c*) Ibid. s. 6.

(*d*) This is that sort, of which an

example is given in the Appendix, No. IV.

of fine; for thereby the deforciant, in order to keep his covenant with the plaintiff, of conveying to him the lands in question, and at the same time to avoid the formality of an actual feoffment and livery, acknowledges in court a former feoffment or gift in possession, to have been made by him to the plaintiff. This fine is therefore said to be a feoffment of record; the livery, thus acknowledged in court, being equivalent to an actual livery: so that this assurance is rather a confession of a former conveyance, than a conveyance now originally made; for the deforciant or cognizor acknowledges, **cognoscit*, the right to be in the plaintiff, or cognizee, as that which he hath *de son done*, of the proper gift of himself, the cognizor. 2. A fine "*sur cognizance de droit tantum*," or upon acknowledgment of the right merely; not with the circumstance of a preceding gift from the cognizor. This is commonly used to pass a *reversionary* interest, which is in the cognizor. For of such reversions there can be no feoffment, or donation with livery, supposed; as the possession during the particular estate belongs to a third person (*e*). It is worded in this manner: "that the cognizor acknowledges the right to be in the cognizee; and grants for himself and his heirs, that the reversion, after the particular estate determines, shall go to the cognizee" (*f*). 3. A fine "*sur concessit*" is where the cognizor, in order to make an end of disputes, though he acknowledges no precedent right, yet grants to the cognizee an estate *de novo*, usually for life or years, by way of supposed composition. And this may be done reserving a rent, or the like; for it operates as a new grant (*g*). 4. A fine, "*sur done, grant, et render*," is a double fine, comprehending the fine *sur cognizance de droit, come ceo, &c.*, and the fine *sur concessit*: and may be used to create particular limitations of estate: whereas the fine *sur cognizance de droit, come ceo, &c.* conveys nothing but an absolute estate, either of inheritance or at least of freehold (*h*). In this last species of fine, the cognizee, after the right is acknowledged to be in him, grants back again, or renders to the cognizor, or perhaps to a stranger, some other estate in the premises. But, in general, the first species of fine,

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*Sur cognizance
de droit tantum.**Sur concessit.**Sur done, grant,
et render.*(*e*) Moor, 629.(*f*) West. Symb. p. 2, s. 95.(*g*) West, p. 2, s. 66.(*h*) Salk. 340.

sur cognizance de droit, come ceo, &c., is the most used, as it conveys a clean and absolute freehold, and gives the cognizee a seisin in law, without any actual livery; and is therefore called a fine executed, whereas the others are but executory.

3. We are next to consider the *force* and *effect* of a fine. These principally depend, at this day, on the common law, and the two statutes, 4 Hen. VII. c. 24, and 32 Hen. VIII. c. 36. The ancient common law with respect to this point, ^{3. Of their force and effect.} *is* very forcibly declared by the statute 18 Edw. I., in these words: "And the reason, why such solemnity is required
" in the passing of a fine, is this: because the fine is so high
" a bar, and of so great force, and of a nature so powerful
" in itself, that it precludes not only those which are parties
" and privies to the fine, and their heirs, but all other per-
" sons in the world, who are of full age, out of prison, of
" sound memory, and within the four seas, the day of the
" fine levied; unless they put in their claim on the foot (*h*)
" of the fine within a year and a day." But this doctrine, of barring the right by *non-claim*, was abolished for a time by a statute made in 34 Edw. III. c. 16, which admitted persons to claim and falsify a fine, at any indefinite distance (*i*); whereby, as Sir Edward Coke observes (*k*), great contention arose, and few men were sure of their possessions, till the parliament, held 4 Hen. VII., reformed that mischief, and excellently moderated between the latitude given by the statute and the rigour of the common law. For the statute then made (*l*), restored the doctrine of *non-claim*; but extended the time of claim. So that now, by that statute, the right of all strangers whatsoever is bound, unless they make claim, by way of action or lawful entry, not within *one* year and a day, as by the common law, but within *five* years after proclamations made: except feme-coverts, infants, prisoners, persons beyond the seas, and such as are not of whole mind; who have five years allowed to them and their heirs, after

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(*h*) *Sur la pie* as it is in the Cotton MS. and not *pur le pais*, as printed by Berthelet, and in 2 Inst. 511. There were then four methods of claiming, so as to avoid being concluded by a fine: 1. By action; 2. By entering such claim on the record at the *foot* of the fine; 3. By entry

on the lands; 4. By continual claim. (2 Inst. 518.) The second is not now in force under the statute of Hen. VII.

(*i*) Litt. s. 441.

(*k*) 2 Inst. 518.

(*l*) 4 Hen. VII. c. 24. See page

118.

the death of their husbands, their attaining full age, recovering their liberty, returning into England, or being restored to their right mind (9).

By 32 Hen.
VIII. c. 36, a
fine duly levied
is declared to be
a perpetual bar
to an estate-
tail.

[* 355]

It seems to have been the intention of that politic prince, king Hen. VII., to have covertly by this statute extended fines to have been a bar of estates-tail (10), in order to unfetter the more easily the estates of his powerful nobility, and lay *them more open to alienations; being well aware that power will always accompany property. But doubts having arisen whether they could, by mere implication, be adjudged a sufficient bar, (which they were expressly declared *not* to be by the statute *de donis*,) the statute 32 Hen. VIII. c. 36, was thereupon made; which removes all difficulties, by declaring that a fine levied by any person of full age, to whom or to whose ancestors lands have been entailed, shall be a perpetual bar to them and their heirs claiming by force of such entail: unless the fine be levied by a woman after the death of her husband, of lands which were, by the gift of him or his ancestor, assigned to her in tail for her jointure(*m*); or unless it be of lands entailed by act of parliament or letters patent, and whereof the reversion belongs to the crown (11).

(*m*) See statute 11 Hen. VII. c. 20.

(9) By the statute of 3 & 4 Gul. IV. c. 74, s. 15, every tenant in tail is empowered to dispose, either absolutely in fee simple or for a less estate, of the lands entailed, as against all persons who might have claimed the lands by force of the estate tail if it had not been so defeated. By the 40th section it is enacted, that every disposition of lands under this statute, by a tenant in tail, may be effected by any deed (but not by will) by which he could have disposed of the same if he had been seised in fee; provided that no disposition resting only in contract shall be of any force under this act, although such contract shall be evidenced by deed; and if the tenant in tail making the disposition be a married woman, the concurrence of her husband is necessary

to give effect to the same. By the 41st section it is enacted, that every assurance made under this act (except leases not exceeding 21 years) shall be inoperative unless it is enrolled within six months. The 54th section makes a further exception as to copyholds, as to which enrolment is not required, otherwise than on the court rolls.

(10) The 17th section of the act cited in the last note repeals the act of 11 Hen. VII. c. 20, except as to settlements made before the 28th of August, 1833.

(11) The 18th section of the act of 3 & 4 Gul. IV. so often referred to, excepts from its operation lands to which the king is in reversion, and lands holden by tenants in tail after possibility of issue extinct.

From this view of the common law, regulated by these statutes, it appears, that a fine is a solemn conveyance on record from the cognizor to the cognizee, and that the persons bound by a fine are *parties*, *privies*, and *strangers*. As to the persons bound by a fine.

The *parties* are, either the cognizors, or cognizees, and these are immediately concluded by the fine, and barred of any latent right they might have, even though under the legal impediment of coverture. And, indeed, as this is almost the only act that a *feme-covert*, or married woman, is permitted by law to do, (and that because she is privately examined as to her voluntary consent (12), which removes the general suspicion of compulsion by her husband,) it is, therefore, the usual and almost the only safe method, whereby she can join in the sale, settlement, or incumbrance, of any estate. Parties.

Privies to a fine are such as are any way related to the parties who levy the fine, and claim under them by any right of blood, or other right of representation. Such as are the heirs general of the cognizor, the issue in tail, since the statute of Henry the eighth, the vendee, the devisee, and all others who must make title by the persons who levied the fine. For the act of the ancestor shall bind the heir, and the act *of the principal his substitute, or such as claim under any conveyance made by him subsequent to the fine so levied (*n*). Privies. [* 356]

Strangers to a fine are all other persons in the world, except only parties and privies. And these are also bound by a fine, unless, within five years after proclamations made, they interpose their claim; provided they are under no legal impediments, and have then a present interest in the estate. The impediments, as hath before been said, are coverture, infancy, imprisonment, insanity, and absence beyond sea: and persons who are thus incapacitated to prosecute their rights, have five years allowed them to put in their claims after such impediments are removed. Persons, also, that have not a present, but a future interest only, as those in remainder or reversion, have five years allowed them to claim in, from the time that such right accrues (*o*). And if Strangers.

(*n*) 3 Rep. 87.

(*o*) Co. Litt. 372.

(12) But see, now, the 24th, 40th, the last note but two. and 45th sections of the act cited in

within that time they neglect to claim, or (by the statute 4 Ann. c. 16,) if they do not bring an action to try the right within one year after making such claim, and prosecute the same with effect, all persons whatsoever are barred of whatever right they may have, by force of the statute of non-claim.

To make a fine available, the parties must have an interest in the land.

But, in order to make a fine of any avail at all, it is necessary that the parties should have some interest or estate in the lands to be affected by it. Else it were possible that two strangers, by a mere confederacy, might, without any risk, defraud the owners by levying fines of their lands; for, if the attempt be discovered, they can be no sufferers, but must only remain *in statu quo*: whereas, if a tenant for life levies a fine, it is an absolute forfeiture of his estate to the remainder-man or reversioner (*p*), if claimed in proper time. It is not, therefore, to be supposed that such tenants will frequently run so great a hazard; but if they do, and the claim is not duly made within five years after their respective terms expire (*q*), the estate is for ever barred by it. Yet, where a stranger, whose presumption cannot thus be punished, officiously interferes in an estate which in nowise belongs to him, *his fine is of no effect; and may at any time be set aside (unless by such as are parties or privies thereunto) (*r*), by pleading that "*partes finis nihil habuerunt*." And, even if a tenant for years, who hath only a chattel interest, and no freehold in the land, levies a fine, it operates nothing, but is liable to be defeated by the same plea (*s*). Wherefore, when a lessee for years is disposed to levy a fine, it is usual for him to make a feoffment first, to displace the estate of the reversioner (*t*), and create a new freehold by disseisin. And thus much for the conveyance or assurance by fine: which not only, like other conveyances, binds the grantor himself, and his heirs; but also all mankind, whether concerned in the transfer or no, if they fail to put in their claims within the time allotted by law.

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IV. Common recoveries.

IV. The fourth species of assurance, by matter of record, is a *common recovery*. Concerning the original of which it was formerly observed (*u*), that common recoveries

(*p*) Co. Litt. 251.

(*q*) 2 Lev. 52.

(*r*) Hob. 334.

(*s*) 5 Rep. 123; Hardr. 401.

(*t*) Hardr. 402; 2 Lev. 52.

(*u*) Pag. 117, 271.

were invented by the ecclesiastics to elude the statutes of mortmain; and afterwards encouraged by the finesse (13) of the courts of law in 12 Edw. IV. in order to put an end to all fettered inheritances, and bar not only estates-tail, but also all remainders and reversions expectant thereon. I am now, therefore, only to consider, first, the *nature* of a common recovery; and, secondly, its *force* and *effect*.

1. And, first, the *nature* of it; or what a common recovery is. A common recovery is so far like a fine, that it is a suit or action, either actual or fictitious; and in it the lands are *recovered* against the tenant of the freehold; which recovery, being a supposed adjudication of the right, binds all persons, and vests a free and absolute fee-simple in the

1. Their nature.

(13) The observations made, *ante*, in the note to p. 348, are applicable here: and see p. 271.

When the nobles of the land formed a body too powerful for both the king and the people, their concurrence in any legislative enactment rendering their estates alienable was not to be expected. Under such circumstances, any chicanery, any feigned process, (however gross the fiction, and however notoriously untrue the plea solemnly recorded,) was justifiable to sap and undermine the basis of petty feudal tyranny; no more direct and open means being in the power of our ancestors. (See the note to Vol. III. p. 286.) But, why should all these figments, and every technical detail of the artificial contrivances by which they were, and still are, carried on, be retained, now they are no longer necessary? It being now incontrovertibly established, that estates tail and all remainders and reversions in such estates (with an exception as to estates tail granted by the crown, as a reward for public services,) may be barred, by going through the processes of fines and recoveries, why should not the operation be simplified? Originally, subterfuge was necessary to conceal the design of making real property the subject of

free commerce; that necessity no longer exists. Why still employ the language of technical (and therefore, to unprofessional persons, obscure) fiction, rather than that of plain truth, which would be intelligible to the party upon whose property it was to operate? The feigned actions in question, when all the forms have been accurately observed, not unfrequently lead to consequences of a very deplorable kind: the instances are frequent in which a testator, by suffering a recovery after his will was made, (perhaps with the sole intention of rendering that will more effectual,) has left those destitute whom he was bound in duty, and was most desirous, to provide for; but this result has followed as a necessary corollary of that doctrine by which a recoveror (a *fictitious* recoveror) is said to be in of a new estate, even though, in fact, he may only take the very same, in all respects, which he had before. The whole system, with all its intricate, cumbrous, and expensive machinery, requires new modelling.

Since this note was first published, fines and recoveries have been abolished, and more simple modes of assurance substituted, by the statute of 3 & 4 Gul. IV. c. 74.

recoveror. A recovery, therefore, being in the nature of an action at law, not immediately compromised like a fine, but carried on through every regular stage of proceeding, I am greatly apprehensive that its form and method will not be easily understood by the student who is not yet acquainted

[* 358] *with the course of judicial proceedings, which cannot be thoroughly explained, till treated of at large in the third book of these commentaries. However, I shall endeavour to state its nature and progress, as clearly and concisely as I can; avoiding, as far as possible, all technical terms and phrases not hitherto interpreted.

Practice as to
suffering reco-
veries.

Let us, in the first place, suppose David Edwards (*w*) to be tenant of the freehold, and desirous to suffer a common recovery, in order to bar all entails, remainders, and reversions, and to convey the same in fee-simple to Francis Golding. To effect this, Golding is to bring an action against him for the lands; and he accordingly sues out a writ, called a *præcipe quod reddat*, because those were its initial or most operative words, when the law proceedings were in Latin. In this writ the demandant Golding alleges that the defendant Edwards (here called the tenant) has no legal title to the land; but that he came into possession of it after one Hugh Hunt had turned the demandant out of it (*x*). The subsequent proceedings are made up into a record or recovery roll (*y*), in which the writ and complaint of the demandant are first recited: whereupon the tenant appears, and calls upon one Jacob Morland, who is supposed, at the original purchase, to have warranted the title to the tenant; and thereupon he prays that the said Jacob Morland may be called in to defend the title which he so warranted. This is called the *voucher*, *vocatio*, or calling of Jacob Morland to warranty; and Morland is called the *vouchee*. Upon this, Jacob Morland, the vouchee, appears, is impleaded, and defends the title. Whereupon, Golding, the demandant, desires leave of the court to *imparl*, or confer with the vouchee in private; which is (as usual) allowed him. And soon afterwards the demandant, Golding, returns to court, but Morland, the vouchee, disappears, or makes default. Whereupon, judgment is given for the demandant, Golding, now called the recoveror, to recover the

(*w*) See Appendix, No. V.

(*x*) S. 1.

(*y*) S. 2.

lands in question against the tenant, Edwards, who is now the recoveree :* and Edwards has judgment to recover of [* 359] Jacob Morland lands of equal value, in recompence for the lands so warranted by him, and now lost by his default ; which is agreeable to the doctrine of warranty mentioned in the preceding chapter (z). This is called the recompence, or *recovery in value*. But, Jacob Morland having no lands of his own, being usually the cryer of the court, (who, from being frequently thus vouched, is called the *common vouchee*,) it is plain, that Edwards has only a nominal recompence for the lands so recovered against him by Golding ; which lands are now absolutely vested in the said recoveror by judgment of law, and seisin thereof is delivered by the sheriff of the county. So that this collusive recovery operates merely in the nature of a conveyance in fee-simple, from Edwards, the tenant in tail, to Golding, the purchasor.

The recovery, here described, is with a *single* voucher only ; but sometimes it is with *double*, *treble*, or farther voucher, as the exigency of the case may require. And, indeed, it is now usual always to have a recovery with double voucher at the least : by first conveying an estate of freehold to any indifferent person, against whom the *præcipe* is brought ; and then he vouches the tenant in tail, who vouches over the common vouchee (a). For, if a recovery be had immediately against tenant in tail, it bars only such estate in the premises of which he is then actually seised ; whereas, if the recovery be had against another person, and the tenant in tail be vouched, it bars every latent right and interest which he may have in the lands recovered (b). If Edwards therefore be tenant of the freehold in possession, and John Barker be tenant in tail in remainder, here Edwards doth first vouch Barker, and then Barker vouches Jacob Morland, the common vouchee ; who is always the last person vouched, and always makes default : whereby the demandant, Golding, recovers the land against the tenant, Edwards, and Edwards recovers a recompence of equal value against Barker the first vouchee ; who recovers the like

Recovery with double voucher.

(z) Pag. 301.

(b) Br. Abr. tit. *Taile*, 32 ; Plowd. 8.

(a) See Appendix, pag. xviii.

against Morland, the common vouchee, against whom such ideal recovery in value is always ultimately awarded.

The reasoning upon which the doctrine of recoveries was formerly said to be founded.

This supposed recompence in value is the reason why the issue in tail is held to be barred by a common recovery. For, if the recoveree should obtain a recompence in lands from the common vouchee, (which there is a possibility in contemplation of law, though a very improbable one, of his doing,) these lands would supply the place of those so recovered from him by collusion, and would descend to the issue in tail (c). This reason will also hold with equal force, as to *most* remainder-men and reversioners; to whom the possibility will remain and revert, as a full recompence for the reality, which they were otherwise entitled to; but, it will not *always* hold: and, therefore, as Pigot says (d), the judges have been even *astuti* in inventing other reasons to maintain the authority of recoveries. And, in particular, it hath been said, that, though the estate-tail is gone from the recoveree, yet it is not *destroyed*, but *only transferred*; and still subsists, and will ever continue to subsist (by construction of law) in the recoveror, his heirs and assigns: and, as the estate-tail so continues to subsist for ever, the remainders or reversions expectant on the determination of such estate-tail can never take place.

They are now considered as a mere formal mode of conveyance.

To such awkward shifts, such subtile refinements, and such strange reasoning, were our ancestors obliged to have recourse, in order to get the better of that stubborn statute *de donis*. The design, for which these contrivances were set on foot, was certainly laudable; the unriveting the fetters of estates-tail, which were attended with a legion of mischiefs to the commonwealth: but, while we applaud the end, we cannot but admire the means. Our modern courts of justice have indeed adopted a more manly way of treating the subject; by considering common recoveries in no other light than as the formal mode of conveyance, by which tenant in tail is enabled to aliene his lands. But, since the ill consequences of fettered inheritances are now generally seen* and allowed, and of course the utility and expedience of setting them at liberty are apparent, it hath often been wished that the process of this conveyance was shortened,

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(c) Dr. & St. b. 1, Dial. 26.

(d) Of Com. Recov. 13, 14.

and rendered less subject to niceties, by either totally repealing the statute *de donis*; which, perhaps, by reviving the old doctrine of conditional fees, might give birth to many litigations: or, by vesting in every tenant in tail of full age the same absolute fee-simple at once, which now he may obtain whenever he pleases, by the collusive fiction of a common recovery; though, this might possibly bear hard upon those in remainder or reversion by abridging the chances they would otherwise frequently have, as no recovery can be suffered in the intervals between term and term, which sometimes continue for near five months together: or lastly, by empowering the tenant in tail to bar the estate tail by a solemn deed, to be made in term time, and enrolled in some court of record: which is liable to neither of the other objections, and is warranted not only by the usage of our American colonies, and the decisions of our own courts of justice, which allow a tenant in tail (without fine or recovery) to appoint his estate to any *charitable* use (*e*), but also by the precedent of the statute (*f*) 21 Jac. I. c. 19, which, in case of a bankrupt tenant in tail empowers his commissioners to sell the estate at any time, by deed indented and enrolled. And, if, in so national a concern, the emoluments of the officers concerned in passing recoveries are thought to be worthy attention, those might be provided for in the fees to be paid upon each enrolment.

2. The *force* and *effect* of common recoveries may appear, from what has been said, to be an absolute bar, not only of all estates-tail, but of remainders and reversions expectant on the determination of such estates (14). So that a tenant in tail may, by this method of assurance, convey the lands held in tail to the recoveror, his heirs and assigns, absolutely, free and discharged of all conditions and limitations in tail, and of all remainders and reversions. But, by statute 34 & 35 Hen. VIII. c. 20, no recovery had against tenant in tail, of the king's gift, whereof the remainder or reversion is in the king, shall bar such estate tail, or the remainder or reversion of the crown. And by the statute 11

2. Their force and effect.

(*e*) See pag. 376.

(*f*) See pag. 286.

(14) See *ante*, the note to p. 354.

Hen. VII. c. 20, no *woman, after her husband's death, shall suffer a recovery of lands settled on her by her husband, or settled on her husband and her by any of his ancestors. And by statute 14 Eliz. c. 8, no tenant for life, of any sort, can suffer a recovery, so as to bind them in remainder or reversion. For which reason, if there be tenant for life, with remainder in tail, and other remainders over, and the tenant for life is desirous to suffer a valid recovery; either he, or the tenant to the *præcipe* by him made, must *vouch* the remainder-man in tail, otherwise the recovery is void: but if he does vouch such remainder-man, and he appears and vouches the common vouchee, it is then good; for, if a man be vouched and appears, and suffers the recovery to be had against the tenant to the *præcipe*, it is as effectual to bar the estate-tail as if he himself were the recoveree (*f*).

The tenant to the *præcipe* must be actually seised of the freehold.

In all recoveries it is necessary that the recoveree, or tenant to the *præcipe*, as he is usually called, be actually seised of the freehold, else the recovery is void (*g*). For all actions to recover the seisin of lands, must be brought against the actual tenant of the freehold, else the suit will lose its effect; since the freehold cannot be recovered of him who has it not. And though these recoveries are in themselves fabulous and fictitious, yet it is necessary that there be *actores fabulæ* properly qualified. But the nicety thought by some modern practitioners to be requisite in conveying the legal freehold, in order to make a good tenant to the *præcipe*, is removed by the provisions of the statute 14 Geo. II. c. 20, which enacts, with a retrospect and conformity to the ancient rule of law (*h*), that, though the legal freehold be vested in lessees, yet those who are entitled to the next freehold estate in remainder or reversion may make a good tenant to the *præcipe*;—that, though the deed or fine which creates such tenant be subsequent to the judgment of recovery, yet, if it be in the same term, the recovery shall be valid in law;—and that, though the recovery itself do not appear to be entered, or be not regularly entered, on record, yet the deed to make a tenant to the *præcipe*, and declare the uses of the recovery, shall, [* 363] *after a possession of twenty years, be sufficient evidence, on behalf of a purchasor for valuable consideration, that such

(*f*) Salk. 571.

(*g*) Pigot, 28.

(*h*) Pigot, 41, &c.; 4 Burr. l. 115.

recovery was duly suffered. And this may suffice to give the student a general idea of common recoveries, the last species of assurances by matter of record.

Before I conclude this head, I must add a word concerning deeds to *lead*, or to *declare*, the *uses* of fines, and of recoveries. For if they be levied or suffered without any good consideration, and without any uses declared, they, like other conveyances, enure only to the use of him who levies or suffers them (*i*). And if a consideration appears, yet, as the most usual fine "*sur cognizance de droit, come ceo, &c.*" conveys an absolute estate, without any limitations, to the cognizee; and as common recoveries do the same to the recoveror, these assurances could not be made to answer the purpose of family settlements, (wherein a variety of uses and designations is very often expedient,) unless their force and effect were subjected to the direction of other more complicated deeds, wherein particular uses can be more particularly expressed. The fine or recovery itself, like a power once gained in mechanics, may be applied and directed to give efficacy to an infinite variety of movements in the vast and intricate machine of a voluminous family settlement. And if these deeds are made previous to the fine or recovery, they are called deeds to *lead* the uses; if subsequent, deeds to *declare* them. As, if A., tenant in tail, with reversion to himself in fee, would settle his estate on B. for life, remainder to C. in tail, remainder to D. in fee; this is what by law he has no power of doing effectually, while his own estate-tail is in being. He therefore usually, after making the settlement proposed, covenants to levy a fine (or if there be any intermediate remainders, to suffer a recovery) to E., and directs that the same shall enure to the uses in such settlement mentioned. This is now a deed to *lead* the uses of the fine or recovery; and the fine when levied, or recovery when suffered, shall enure to the uses so specified, and no other. For though E., the cognizee or recoveror, hath a fee simple vested in himself by the fine or recovery; yet, by the operation of this deed, he becomes a mere instrument or conduit-pipe, seised only to the use of B., C., and D., in successive order: which use is executed immediately, by force of the statute of uses (*k*).

Of deeds to *lead*,
or to *declare*,
the uses of fines
and recoveries.

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(*i*) Dyer, 18.

more clearly illustrated by example.

(*k*) This doctrine may perhaps be In the deed or marriage settlement in

Or, if a fine or recovery be had without any previous settlement, and a deed be *afterwards* made between the parties, *declaring* the uses to which the same shall be applied, this will be equally good as if it had been expressly levied or suffered in consequence of a deed directing its operation to those particular uses. For, by statute 4 & 5 Ann. c. 16, indentures to *declare* the uses of fines and recoveries, made *after* the fines and recoveries had and suffered, shall be good and effectual in law, and the fine and recovery shall enure to such uses, and be esteemed to be only in trust, notwithstanding any doubts that had arisen on the statute of frauds, 29 Car. II. c. 3, to the contrary (15).

the Appendix, No. II. s. 2, we may suppose the lands to have been originally settled on Abraham and Cecilia Barker for life, remainder to John Barker in tail, with divers other remainders over, reversion to Cecilia Barker in fee; and now intended to be settled to the several uses therein expressed, *viz.* to Abraham and Cecilia Barker, till the marriage of John Barker with Catherine Edwards, and then to John Barker for life; remainder to trustees to preserve the contingent remainders; remainder to his wife Catherine for life, for her jointure; remainder to other trustees, for a term of five hundred years; remainder to the first and other sons of the marriage in tail; remainder to the daughters in tail; remainder to John Barker in tail; remainder to Cecilia Barker in fee. Now, it is necessary, in order to bar the estate-tail of John

Barker, and the remainders expectant thereon, that a recovery be suffered of the premises; and it is thought proper (for though usual it is by no means necessary; see Forrester, 167,) that in order to make a good tenant of the freehold or tenant to the *præcipe*, during the coverture, a fine should be levied by Abraham, Cecilia, and John Barker; and that the recovery itself be suffered against this tenant to the *præcipe*, who shall vouch John Barker, and thereby bar his estate-tail, and become tenant of the fee-simple by virtue of such recovery; the uses of which estate so acquired are to be those expressed in this deed. Accordingly, the parties covenant to do these several acts (see pag. viii.); and in consequence thereof the fine and recovery are had and suffered, (No. IV. and No. V.,) of which this conveyance is a deed to *lead* the uses.

(15) By the statute of 7 Geo. IV. c. 45, a person who would be entitled to an estate-tail in lands directed to be purchased under a settlement or will, may elect to take the money without having it so invested. But before an order under the statute is made, the court always directs a reference to the Master, to inquire whether the parties have in any manner encumbered, or settled their interests in the money. (*Ex parte Hodges*, 6

Ves. 576; *Green v. Stephens*, 17 Ves. 79.) It has also been determined, that the act applies only when the right is clear and indisputable; and that, where there is any question as to the right, the court is not, upon an *ex parte* petition, to enter into that question, in the absence of any of the parties interested. (*Ex parte Sterne*, 6 Ves. 157; *Ex parte Rees*, 3 Ves. & Bea. 11.)

CHAPTER XXII.

OF ALIENATION BY SPECIAL CUSTOM.

WE are next to consider assurances by special custom, obtaining only in particular places, and relative only to a particular species of real property. This, therefore, is a very narrow title; being confined to copyhold lands (1), and such customary estates as are holden in ancient demesne (2), or in manors of a similar nature; which, being of a very peculiar kind, and originally no more than tenancies in pure or privileged villenage, were never alienable by deed; for, as that might tend to defeat the lord of his signiory, it is therefore a forfeiture of a copyhold (a). Nor are they transferable by matter of record, even in the king's courts (3), but only in the court (4) baron of the lord. The method of doing

Of alienation of
copyhold lands.

(a) Litt. s. 74.

(1) See *ante*, pp. 95 & 97.

(2) See *ante*, pp. 99 & 100, with note (51) to chapter 6.

(3) Littleton, (sect. 76,) was probably our author's authority for the doctrine stated in the text. Littleton says, "tenants by copy of court roll shall neither implead nor be impleaded for their tenements by the king's writ. But, if they will implead others for their tenements, they shall have a plaint entered in the lord's court." But, in *Widdowson v. Earl of Harrington*, (1 Jac. & Walk. 549,) the Master of the Rolls observed, "with respect to the manner of proceeding for the recovery of copy-

holds, it is said by counsel, that it can be only by plaint in the lord's court; but, that is quite a mistake. There *was* a time when it was doubted whether you could proceed by the king's writ,—whether you could bring an ejectment for a copyhold. *But all that has given way*, and the king's courts are now open to ejectments for copyholds, in the same way as for freeholds. What is said by Littleton, (sect. 76,) applies generally to *all* actions, but we know that, at this day, it is not true to that extent." And see *post*, p. 369.

(4) See *ante*, pp. 54, 90, 100. Vol. III. p. 33. The 50th, 51st, 52nd,

this is generally by *surrender*; though in some manors, by special custom, recoveries may be suffered of copyholds (*b*); but these differing in nothing material from recoveries of free land, save only that they are not suffered in the king's courts, but in the court baron of the manor, I shall confine myself to conveyances by surrender, and their consequences.

By surrender.

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Surrender (5), *sursumredditio*, is the yielding up of the estate by the tenant into the hands of the lord, for such purposes as in the surrender are expressed. As, it may be, to the use and behoof of A. and his heirs; to the use of his own will; and the like. The process, in most manors, is, that *the tenant comes to the steward, either in court, (or, if the custom permits, out of court,) or else to two customary tenants of the same manor, provided there be also a custom to warrant it; and there, by delivering up a rod, a glove, or other symbol, as the custom directs, resigns into the hands of the lord, by the hands and acceptance of his said steward, or of the said two tenants, all his interest and title to the estate; in trust to be again granted out by the lord, to such persons and for such uses as are named in the surrender, and the custom of the manor will warrant. If the surrender be made out of court, then, at the next or some subsequent court, the jury or homage must present and find it upon their oaths; which presentment is an information to the lord or his steward of what has been transacted out of court. Immediately upon such surrender, in court, or upon presentment of a surrender made out of court, the lord by his steward grants the same land again to *cestuy que use*, (who is sometimes, though rather improperly, called the surrenderee,) to hold by the ancient rents and customary services; and thereupon admits him tenant to the copyhold, accord-

(*b*) Moor, 637.

53rd, and 54th sections of the statute of 3 & 4 Gul. IV. c. 74, provide that the previous clauses of that act, (by which a tenant in tail is enabled to destroy the entail by simpler means than fine or recovery,) shall apply to copyholds, so far as the nature of those tenures will admit. A legal estate-tail in copyholds must be disposed of by surrender; but an equi-

table estate-tail may be disposed of, under the act cited, either by a surrender or by deed. Whether the disposition of lands held by copy of court-roll be made by surrender or by deed, by the tenant in tail thereof, the transaction does not require enrolment, otherwise than by entry on the court-rolls.

(5) See *ante*, p. 326.

ing to the form and effect of the surrender, which must be exactly pursued. And this is done by delivering up to the new tenant the rod, or glove, or the like, in the name, and as the symbol, of corporal seisin of the lands and tenements. Upon which admission he pays a fine to the lord according to the custom of the manor, and takes the oath of fealty.

In this brief abstract of the manner of transferring copyhold estates, we may plainly trace the visible footsteps of the feudal institutions. The fief, being of a base nature and tenure, is unalienable without the knowledge and consent of the lord. For this purpose it is resigned up, or surrendered into his hands. Custom, and the indulgence of the law, which favours liberty, has now given the tenant a right to name his successor; but formerly it was far otherwise (6). And I am apt to suspect that this right is of much the same antiquity with the introduction of uses with respect to freehold lands; for the alienee of a copyhold had merely *jus fiduciarium*, for which *there was no remedy at law, but only by *subpœna* in Chancery (c). When therefore the lord had accepted a surrender of his tenant's interest, upon confidence to re-grant the estate to another person, either then expressly named or to be afterwards named in the tenant's will, the Chancery enforced this trust as a matter of conscience; which jurisdiction, though seemingly new in the time of Edward IV. (d), was generally acquiesced in, as it opened the way for the alienation of copyholds, as well as of freehold estates, and as it rendered the *use* of them both equally devisable by testament. Yet, even to this day, the new tenant cannot be admitted but by composition with the lord, and paying him a fine by way of acknowledgment for the license of alienation. Add to this the plain feudal investiture (7), by delivering the symbol of seisin in presence of the other tenants in open court; "*quando hasta vel aliud corporeum quidlibet porrigitur a domino se investituram facere dicente; quæ saltem coram duobus vasallis solemn-*

The surrender being accepted by the lord, the Court of Chancery enforced the performance of the trusts upon which the surrender was made.

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(c) Cro. Jac. 568.

(d) Bro. Abr. tit. *Tenant per Copie*, 10.

(6) See *ante*, pp. 95 and 97, with the notes thereto.

(7) See *ante*, p. 54, and note.

“*ter fieri debet*” (e): and, to crown the whole, the oath of fealty (8) is annexed, the very bond of feudal subjection. From all which we may fairly conclude, that, had there been no other evidence of the fact in the rest of our tenures and estates, the very existence of copyholds, and the manner in which they are transferred, would incontestably prove the very universal reception which this northern system of property for a long time obtained in this island; and which communicated itself, or at least its similitude, even to our very villeins and bondmen.

Surrender the only mode of conveying copyholds.

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This method of conveyance is so essential to the nature of a copyhold estate, that it cannot properly be transferred by any other assurance. No feoffment or grant has any operation thereupon. If I would exchange a copyhold estate with another, I cannot do it by an ordinary deed of exchange at the common law, but we must surrender to each other's use, and the lord will admit us accordingly. If I would devise a copyhold, I must surrender* it to the use of my last will and testament (9); and in my will I must declare my intentions, and name a devisee, who will then be entitled to admission (f). A fine of recovery had of copyhold lands in the king's court may indeed, if not duly reversed, alter the tenure of the lands, and convert them into frank fee (g), which is defined in the old book of tenures (h) to be “land pleadable at the common law:” but, upon an action on the case, in the nature of a writ of *deceit*, brought by the lord in

(e) Feud. l. 2, t. 2.

recto clauso. F. N. B. 13.

(f) Co. Copyh. s. 36.

(h) t. *tenir en franke fee.*

(g) Old Nat. Brev. t. *briefe de*

(8) See *ante*, p. 45, with the note.

(9) The statute of 55 Geo. III. c. 192, has made dispositions of copyhold estates by will effectual, although no previous surrender to the uses thereof may have been made. The act provides that this indulgence shall not operate in fraud of the lord of the manor, or of the crown; but, that the devisee shall be admitted only on payment of all such stamp duties, fees, and sums of money as would have been payable upon a surrender to the

use of the will. The act does not supply the defect of a surrender by a *feme covert*, where, by the custom of the manor, such surrender is necessary to substantiate her will; for, in such cases, a separate examination of the *feme covert* is essential to a free disposal of the property by her; and the statute in question was intended to supply mere matter of form only. (*Doe v. Bartle*, 5 Barn. & Ald. 507. S. C. 1 Dowl. & Ryl. 91.)

the king's court, such fine or recovery will be reversed, the lord will recover his jurisdiction, and the lands will be restored to their former state of copyhold (i) (10).

In order the more clearly to apprehend the nature of this Practice thereon. peculiar assurance, let us take a separate view of its several parts; the surrender, the presentment, and the admittance.

1. A surrender, by an admittance, subsequent whereto the conveyance is to receive its perfection and confirmation, is rather a manifestation of the alienor's intention, than a transfer of any interest in possession. For, till admittance of *cestuy que use*, the lord taketh notice of the surrenderor as his tenant; and he shall receive the profits of the land to his own use, and shall discharge all services due to the lord. Yet the interest remains in him not absolutely, but *sub modo*; for he cannot pass away the land to any other, or make it subject to any other incumbrance than it was subject to at the time of the surrender. But no manner of legal interest is vested in the nominee before admittance. If he enters, he is a trespasser, and punishable in an action of trespass (11): and if he surrenders to the use of another, such surrender is merely void, and by no matter *ex post facto* can be confirmed. For though he be admitted in pursuance of the original surrender, and thereby acquires afterwards a sufficient and plenary interest as absolute owner, yet his second surrender previous to his own admittance is absolutely void *ab initio*: because at the time of such surrender he had but a possibility of an interest, and could therefore transfer nothing (12): and no subsequent admittance can make an act good, which was *ab initio* void. Yet, though upon the original surrender the nominee hath but a possibility, it is however such a possibility as may, whenever he pleases, be reduced to a certainty: for he cannot either by force or fraud

(i) See Vol. III. pag. 166*.

(10) Now, a person who has a legal estate in copyhold lands may dispose thereof, and bar the entail, by surrender; if his estate be only an equitable one, he may effect the same purposes by deed: see the statute of 3 & 4 Gul. IV. c. 74, ss. 50 to 54, cited *ante*, in the note to p. 365.

(11) Mr. Christian observes, "it

has been determined that the surrenderer may recover in an ejectment against the surrenderor, upon a demise laid after the surrender, where there was an admittance of the nominee before trial. (1 T. R. 600.)"

(12) See *ante*, p. 290, with the note.

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be deprived or deluded of the effect and fruits of the surrender; but, if the lord refuse to admit him, he is compellable to do it (13) by a bill in Chancery, or a *mandamus* (k): *and the surrenderor can in no wise defeat his grant; his hands being for ever bound from disposing of the land in any other way, and his mouth for ever stopped from revoking or countermanding his own deliberate act (l) (14).

2. The presentment.

2. As to the *presentment*; that, by the *general* custom of manors, is to be made at the next court baron immediately after the surrender; but by *special* custom in some places it will be good, though made at the second or other subsequent court. And it is to be brought into court by the *same* persons that took the surrender, and then to be presented by the

(k) 2 Roll. Rep. 107.

(l) Co. Copyh. s. 39.

(13) See *ante*, pp. 95 and 97, note. In the case of *Williams v. Lord Lonsdale*, (3 Ves. 756,) Lord Loughborough, C., said, "it is clearly true, that, if the lord refuses to admit the tenant, this court will compel the lord to admit him, the title standing upon the rolls of the manor. The ground for this court (the court of Chancery) acting between lord and tenant is, that the lord may *de jure* call upon the tenant to be admitted, if he stands out, for the lord has a right to the fine and services. But, this court will not let the parties stand in this situation, that the lord who has remedy against the tenant, to compel him to pay the fine and perform the services, or to forfeit his estate, shall prevent him from having evidence of his title upon the rolls which are in the lord's keeping. The lord does, by permitting a surrender to be entered upon the rolls, partake of a trust in favour of the surrenderee." But, if a bill is brought to be admitted to a copyhold for the purpose of trying the right to it, the court will not interfere where the plaintiff would be barred by the statute of limitations if the land were freehold, or where he does not show such a *prima facie* title

as affords a reasonable prospect of success. (*Widdowson v. Earl of Harrington*, 1 Jac. & Walk. 544, 548, 558.) In the case of *Williams v. Lord Lonsdale*, (before cited,) it was thought that a *mandamus* to the lord of a manor, to grant admission to a copyhold, did not lie; but, it is now settled, as laid down in the text, that a *mandamus* to the lord to admit a copyholder, either claiming by descent or making a *prima facie* title, does lie. (*The King v. The Brewers' Company*, 3 Barn. & Cress. 173; *S. C.* 4 Dowl. & Ryl. 492; *The King v. The Lord of the Manor of Bonsall*, 3 Barn. & Cress. 175; *S. C.* 4 Dowl. & Ryl. 825; *The King v. Coggan*, 6 East, 432.)

(14) Of course it will be understood that a surrender by a copyholder to the use of his own will is always revocable. (See *post*, p. 375, note.) And, if a copyholder surrenders conditionally, and satisfies the condition before admittance of the nominee, the copyholder may surrender again absolutely, without taking a new estate by the admittance and surrender of the nominee in the conditional surrender, and his own subsequent admittance. (Hargrave's note to Co. Litt. 62 a.)

homage; and in all points material must correspond with the true tenor of the surrender itself. And therefore, if the surrender be conditional, and the presentment be absolute, both the surrender, presentment, and admittance thereupon, are wholly void (*m*): the surrender, as being never truly presented; the presentment, as being false; and the admittance, as being founded on such untrue presentment. If a man surrenders out of court, and dies before presentment, and presentment be made after his death, according to the custom, this is sufficient (*n*). So, too, if *cestuy que use* dies before presentment, yet, upon presentment made after his death, his heir according to the custom shall be admitted. The same law is, if those into whose hands the surrender is made, die before presentment; for, upon sufficient proof in court that such a surrender was made, the lord shall be compelled to admit accordingly. And if the steward, the tenants, or others into whose hands such surrender is made, refuse or neglect to bring it in to be presented, upon a petition preferred to the lord in his court baron, the party grieved shall find remedy. But if the lord will not do him right and justice, he may sue both the lord, and them that took the surrender in Chancery, and shall there find relief (*o*) (15).

*3. Admittance is the last stage, or perfection, of copyhold assurances. And this is of three sorts: first, an admittance upon a voluntary grant from the lord; secondly, an admittance upon surrender by the former tenant; and, thirdly, an admittance upon a descent from the ancestor. [* 370]

3. The admittance, of which there are three sorts—

In admittances, even upon a *voluntary grant* from the lord, when copyhold lands have escheated or reverted to him, the lord is considered as an instrument. For though it is in his power to keep the lands in his own hands, or to dispose of them at his pleasure, by granting an absolute fee-simple, a freehold, or a chattel interest therein; and quite to change their nature from copyhold to socage tenure, so that he may well be reputed their absolute owner and lord; yet if he will still continue to dispose of them as copyhold, he is bound to observe the ancient custom pre-

upon a voluntary grant from the lord;

(*m*) Co. Copyh. s. 40.

(*n*) Co. Litt. 62.

(*o*) Co. Copyh. s. 40.

(15) See *ante*, p. 365, note.

cisely in every point, and can neither in tenure nor estate introduce any kind of alteration; for that were to create a new copyhold: wherefore in this respect the law accounts him custom's instrument. For if a copyhold for life falls into the lord's hands by the tenant's death, though the lord may destroy the tenure and enfranchise the land, yet if he grants it out again by copy, he can neither add to nor diminish the ancient rent, nor make any the minutest variation in other respects (*p*): nor is the tenant's estate, so granted, subject to any charges or incumbrances by the lord (*q*) (16.)

upon surrender
by the former
tenant;

In admittances upon *surrender* of another, the lord is to no intent reputed as owner, but wholly as an instrument; and the tenant admitted shall likewise be subject to no charges or incumbrances of the lord; for his claim to the estate is solely under him that made the surrender (*r*).

and upon a de-
scend from the
ancestor.

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And, as in admittances upon surrenders, so in admittances *upon descents* by the death of the ancestor, the lord *is used as a mere instrument; and, as no manner of interest passes into him by the surrender or the death of his tenant, so no interest passes out of him by the act of admittance. And therefore neither in the one case nor the other, is any respect had to the quantity or quality of the lord's estate in the manor. For, whether he be tenant in fee or for years, whether he be in possession by right or by wrong, it is not material; since the admittances made by him shall not be impeached on account of his title, because they are judicial, or rather ministerial acts, which every lord in possession is bound to perform (*s*).

Difference be-
tween admit-

Admittances, however, upon surrender, differ from ad-

(*p*) Co. Copyh. s. 41.

(*r*) 4 Rep. 27; Co. Litt. 59.

(*q*) 8 Rep. 63.

(*s*) 4 Rep. 27; 1 Rep. 140.

(16) Mr. Christian observes, that "where a copyhold has been granted for lives, upon the death of one or more of the lives, the heir of the grantee cannot claim by custom a renewal of the grant for fresh lives upon the payment of a reasonable fine, *i. e.* a fine of two years' value, as in the case of a copyhold of inheritance. No custom to renew a copyhold for

lives is legal, unless the fine has been certain and unvaried, for copyholds grantable for lives only, if the fine is not certain, are like leases of freehold lands for lives, and renewable only upon the best terms the party can make. *Warton v. King*, Anstr. 659." [See *ante*, p. 98, note (44) to chapter 6.—ED.]

mittances upon descent (17) in this, that by surrender no-
 thing is vested in *cestuy que use*, before admittance, no
 more than in voluntary admittances; but upon descent the
 heir is tenant by copy immediately upon the death of his
 ancestor: not indeed to all intents and purposes, for he
 cannot be sworn on the homage nor maintain an action in
 the lord's court as tenant; but to most intents the law tak-
 eth notice of him as of a perfect tenant of the land instantly
 upon the death of his ancestor, especially where he is con-
 cerned with any stranger. He may enter into the land
 before admittance; may take the profits; may punish any
 trespass done upon the ground (*t*); nay, upon satisfying the
 lord for his fine due upon the descent, may surrender into
 the hands of the lord to whatever use he pleases. For
 which reasons we may conclude, that the admittance of an
 heir is principally for the benefit of the lord, to entitle him
 to his fine, and not so much necessary for the strengthening
 and completing the heir's title. Hence indeed an obser-
 vation might arise, that if the benefit which the heir is to
 receive by the admittance, is not equal to the charges of
 the fine, he will never come in and be admitted to his copy-
 hold in court; and so the lord may be defrauded of his
 fine. But to this we may reply in *the words of Sir Ed-
 ward Coke (*u*), "I assure myself, if it were in the election
 "of the heir to be admitted or not to be admitted, he would
 "be best contented without admittance; but the custom in
 "every manor is in this point compulsory. For, either upon

tances upon sur-
 render, and
 upon descent.

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(*t*) 4 Rep. 23.

(*v*) Copyh. s. 41.

(17) An heir-at-law, before admit-
 tance, may do many things which a
 devisee cannot do before admittance.
 But, several *dicta*, and one decision,
 imply that the privileges of a pur-
 chaser before admittance are, in some
 respects, more extensive than those
 of an heir-at-law. An heir-at-law,
 it has been intimated, cannot devise
 a copyhold before admittance thereto;
 though a purchaser of a copyhold, to
 whom a surrender has been made, it
 has never been denied, may devise his
 equitable interest in, or, more pro-
 perly speaking, his right to, the copy-

hold. (*Wainwright v. Elwell*, 1 Mad.
 632, 635; *Davies v. Beversham*, 2
 Freem. 157; *Greenhill v. Greenhill*,
 2 Vern. 680; *Smith v. Triggs*, 1 Str.
 492; *Doe v. Vernon*, 8 East, 22;
Wilson v. Weddell, Yelv. 145.)

This question, however, has been
 set at rest, by the cases of *Right v.*
Banks, (3 Barn. & Ad. 664,) and *King*
v. Turner, on appeal, (1 Mylne &
 Keen, 456,) which have decided, that
 an heir-at-law may devise a copyhold
 estate descended upon him, though
 he has not been admitted.

“pain of forfeiture of their copyhold, or of incurring some
 “great penalty, the heirs of copyholders are enforced, in
 “every manor, to come into court and be admitted (18) ac-
 “cording to the custom within a short time after notice
 “given of their ancestor’s decease” (19).

(18) See *ante*, p. 98, with the notes thereto.

(19) Mr. Christian observes, that “copyholds are not within the statute *de donis*, and cannot be intailed without a special custom within the manor; and where such a custom exists, there may also be a custom to bar the estate-tail, by a recovery suffered in

the lord’s court; but if no such custom appears of barring by recovery, the intail may be barred by surrender, or otherwise it would amount to a perpetuity. 2 Ves. 601. Yet in some manors the custom of barring by one mode, is co-existent with the custom of barring by the other. 2 Bl. Rep. 944.”

CHAPTER XXIII.

OF ALIENATION BY DEVISE.

THE last method of conveying real property is, by *devise*,^{Of alienation by devise.} or disposition contained in a man's last will and testament (1). And, in considering this subject, I shall not at present inquire into the nature of wills and testaments, which are more properly the instruments to convey personal estates; but only into the original and antiquity of devising real estates by will, and the construction of the several statutes upon which that power is now founded.

It seems sufficiently clear, that, before the conquest, lands^{Effects of the doctrine of devises.} were devisable by will (*a*). But, upon the introduction of the military tenures, the restraint of devising lands naturally took place as a branch of the feudal doctrine of non-alienation without the consent of the lord (*b*). And some have questioned whether this restraint (which we may trace even from the ancient Germans (*c*)) was not founded upon truer principles of policy, than the power of wantonly disinheriting the heir by will, and transferring the estate, through the dotage or caprice of the ancestor, from those of his blood to utter strangers. For this, it is alleged, maintained the balance of property, and prevented one man from growing too big or powerful for his neighbours; since it rarely happens, *that the same man is heir to many [* 374] others, though by art and management he may frequently become their devisee. Thus the ancient law of the Athenians directed that the estate of the deceased should al-

(a) Wright of Tenures, 172.

(b) See pag. 57.

(c) Tacit. *de mor. Germ.* c. 21.(1) See *post*, p. 489, and p. 491, note.

ways descend to his children; or, on failure of lineal descendants, should go to the collateral relations: which had an admirable effect in keeping up equality, and preventing the accumulations of estates. But when Solon (*d*) made a slight alteration, by permitting them (though only on failure of issue) to dispose of their lands by testament, and devise away estates from the collateral heir, this soon produced an excess of wealth in some, and of poverty in others: which, by a natural progression, first produced popular tumults and dissensions; and these at length ended in tyranny, and the utter extinction of liberty; which was quickly followed by a total subversion of their state and nation. On the other hand, it would now seem hard, on account of some abuses (which are the natural consequence of free agency, when coupled with human infirmity), to debar the owner of lands from distributing them after his death as the exigence of his family affairs, or the justice due to his creditors, may perhaps require. And this power, if prudently managed, has with us a peculiar propriety; by preventing the very evil which resulted from Solon's institution, the too great accumulation of property: which is the natural consequence of our doctrine of succession by primogeniture, to which the Athenians were strangers. Of this accumulation the ill effects were severely felt even in the feudal times: but it should always be strongly discouraged in a commercial country, whose welfare depends on the number of moderate fortunes engaged in the extension of trade.

The feudal restraint thereon.

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However this be, we find that, by the common law of England since the conquest, no estate, greater than for term of years, could be disposed of by testament (*e*); except only in Kent (2), and in some ancient burghs, and a few particular manors, where their Saxon immunities by special indulgence subsisted (*f*) (3). And though the feudal restraint on alienations *by deed vanished very early, yet this on wills continued for some centuries after: from an apprehension of infirmity and imposition on the testator *in*

(*d*) Plutarch. *in vita Solon*.

(*f*) Litt. s. 167; 1 Inst. 111.

(*e*) 2 Inst. 7.

(2) See *ante*, p. 84, note.

lay, to have the devise executed.

(3) And for the devisees of such tenements the writ *ex gravi querelâ* (Fitzh. N. B. 198.)

extremis, which made such devises suspicious (*g*). Besides, in devises there was wanting that general notoriety, and public designation of the successor, which in descents is apparent to the neighbourhood, and which the simplicity of the common law always required in every transfer and new acquisition of property.

But when ecclesiastical ingenuity had invented the doctrine of uses as a thing distinct from the land, uses began to be devised (4) very frequently (*h*), and the devisee of the use could in Chancery compel its execution. For it is observed by Gilbert (*i*), that, as the Popish clergy then generally sate in the court of Chancery, they considered that men are most liberal when they can enjoy their possessions no longer: and therefore at their death would choose to dispose of them to those, who, according to the superstition of the times, could intercede for their happiness in another world. But, when the statute of uses (*i*) had annexed the possession to the use, these uses, being now the very land itself, became no longer devisable: which might have occasioned a great revolution in the law of devises, had not the statute of wills been made about five years after, *viz.* 32 Hen. VIII. c. 1, explained by 34 Hen. VIII. c. 5, which enacted, that all persons being seised in fee-simple (except

Uses were devisable until the statute of uses, which, by annexing the possession to the use, rendered the land no longer devisable.

But the statute 32 Hen. VIII. c. 1, explained by the 34 Hen. VIII. c. 5, al-

(*g*) Glanv. l. 7, c. 1.

(*h*) Plowd. 414.

(*i*) On Devises, 7.

(*j*) 27 Hen. VIII. c. 10. See Dyer, 143.

(4) See *ante*, p. 329, with the note thereto.

(5) According to our municipal code, which in this respect, as in many others, differs from the civil and the canon law, (*Samuel v. Wilkin-son*, 2 East, 558,) coverture, *prima facie*, excludes a woman from the right of making a will. A writing, executed by a married woman, and styled her will, is (subject to the qualifications of the general rule presently to be stated) a mere nullity. (*Steadman v. Powell*, 1 Addams, 60.) And as it is of the very essence of a will, that it should remain constantly "ambulatory" up to the time of the

testator's decease; (*Matthews v. Warner*, 4 Ves. 210; *Hobson v. Blackburn*, 1 Addams, 278; *Balch v. Symes*, 1 Turn. 92;) it follows, that the will of a *feme sole* ceases to have any operation after she becomes *coverte*. (*Doe v. Staple*, 2 T. R. 695; *Hodsden v. Lloyd*, 2 Br. 544.) And though it might once perhaps have been fairly inferred, that if a woman made a will before marriage, and survived her husband, the will, having been good in its commencement, ought to be considered as having been suspended only, not absolutely countermanded by the espousals, and revived by her becoming *sui juris* before it was

lowed persons
seised in fee-
simple (with
some excep-

memory) might by will and testament in writing devise to any other *person*, except to bodies corporate, two-thirds of

to take effect; (*Brett v. Rigden*, Plowd. 343;) yet it appears to have been long settled, that a woman's marriage is a complete revocation of her will. (*Forse v. Himbling*, 4 Rep. 61; *Cotter v. Layer*, 2 P. Wms. 624.) But, of course, if after the death of her husband, a woman republishes a will made before her marriage, the will so republished must be as effectual to dispose of her estate as if it had been actually and originally made in and during her widowhood: (*Long v. Aldred*, 3 Addams, 51;) and circumstances may be shown amounting to a virtual republication, though no formal republication may have been made. (*Braham v. Burchell*, 3 Addams, 264.)

The incapacity of a *feme covert* to make a testamentary disposition, though a general, is not an universal rule; thus, the right of disposition may be a necessary incident of separate property, or of the duties of a trust: or may reasonably be permitted where the husband is banished for life. (See *ante*, p. 293, with the note.) It has also long been an established doctrine, that a wife may acquire the right of making a will by the special assent of her husband. (*Marriot v. Kinsman*, Cro. Car. 220; *Eston v. Wood*, Cro. Eliz. 27.) If, indeed, a husband's consent that his wife should be at liberty to dispose of property by will, was only given after marriage, and rests merely in agreement between the parties themselves, the agreement is *nudum pactum*, and may be retracted at any time before assent given by the husband to the probate of such will. (Swinb. part 2, sect. 9.) Lord Nottingham even said, that although the wife made the husband her executor, and he proved the will, still he would be no further bound than in honour to perform it. (*Chis-*

well v. Blackwell, 2 Freem. 70.) However, with due submission to this high authority, a further obligation should seem to arise from the oath, which is required from every executor before probate is granted to him, truly to perform the will, and pay all the legacies of the deceased. (*Lindw. 177*; *Rex v. Raines*, 1 Lord Raym. 363; *Anonym.* 1 Ventr. 365; *Brook v. Turner*, 2 Mod. 172.) And in a case where a husband, after marriage, gave a bond to a trustee for the purpose of securing to his wife permission to make a will, the bond was held to be a valid obligation; and it was declared, that the disposition made by the wife, in pursuance of the agreement, if not good as a will, ought to operate as an appointment. (*Marriot v. Kinsman*, Cro. Car. 219, which decision was recognized as sound law by Lord Hardwicke, in *The Duke of Marlborough v. Lord Godolphin*, 2 Ves. sen. 75.)

A fortiori, a bond of the purport above stated, if given before marriage, would indisputably be binding upon the husband himself; and it seems now to be settled, would in equity estop the claims of the wife's heir in respect of her freehold estates, if she actually devised them during coverture. (*Rippon v. Dawday*, Ambl. 565.) The decree made by Lord Camden in the case last cited, went to the point which Lord Hardwicke had previously thrown out for consideration, without being then called upon to determine it. In *Peacock v. Monk*, (2 Ves. sen. 191, 192,) Lord Hardwicke put the question thus:—Can a woman, by bare agreement before marriage, without doing any thing to alter the nature of her real estate, bar her heir? If so, his Lordship intimated, it must be on the principle that the agreement gave the

their lands, tenements, and hereditaments, held in chivalry, and the whole of those held in socage: which now, through tions) to devise certain portions of their lands.

wife a right to come into equity after marriage, to compel the husband to carry his engagement into execution, and to join with her in a fine to re-settle the estate; and then the consideration would be, whether her heir was not bound by the consequences of that agreement. The affirmative was resolved, as already stated, by Lord Camden, and, indeed, had been previously so determined by the House of Lords, in *Wright v. Cadogan*, (6 Br. P. C. 156, fol. edit.,) if, as Lord Camden held, it makes no difference, as to the principle of determination, in a court of equity, whether the wife's estate was legal or equitable. It is true, that a will made by a married woman, if relating to real estate of inheritance not conveyed in trust, though the woman may have been empowered by contract before marriage to make a will, cannot be supported in a court of law, to the prejudice of her heir: (*George v. —*, Ambl. 628:) but if the estate be limited to uses, with a power reserved to the *feme*, before marriage, to declare those uses, in this way her disposal of estates so limited may take effect, and be supported even by a court of common law. (*Doe v. Staple*, 2 T. R. 695.) And, according to the doctrine of courts of equity, it is quite clear a woman may, antecedently to her marriage, reserve a power over a legal estate of which she is seised, so as to be enabled to dispose thereof during her coverture: in case of her making such a disposition, it is at once effective, provided the forms prescribed by the power have been complied with; and if in this respect the execution be defective, equity will interpose to effectuate it against the heir-at-law, whenever the appointment is shown to have been made upon a good (even though not a

valuable) consideration: (*Wilkes v. Holmes*, 9 Mod. 486; *Shannon v. Bradstreet*, 1 Sch. & Lef. 60; *Cotter v. Layer*, 2 P. Wms. 684:) but the court will not, in behalf of mere volunteers, aid a defective execution. (*Wright v. Cadogan*, 2 Eden, 252.) These rules apply, equally, where the wife is only *cestui que trust*, the legal estate being outstanding. (*Wright v. Englefield*, Ambl. 473.) It is to be observed, also, that (at least where the execution of the power is intended in favour of volunteers,) if a power has been given to a married woman to appoint the uses of land by will, without more, the will must be intended such a one as is proper for the disposition of land; and consequently must be subscribed by three witnesses, in the presence of the testator. For, whether such an instrument be, strictly speaking, a will, or only in the nature of a will, it is within all the inconveniences which the statute of frauds intended to prevent. (*Longford v. Eyre*, 1 P. Wms. 741; *Duff v. Dalzell*, 1 Br. 146.) And though, under a special provision to that effect, a donee of a power affecting real estate may, it seems, well execute the same by a will not attested according to the statute of frauds; (*Bath & Montague's case*, 3 Cha. Ca. 69;) yet, no one can reserve a power to dispose of his or her own real estate, by will not executed according to the statute; (*Goodhill v. Brigham*, 1 Bos. & Pull. 198; *Habergham v. Vincent*, 2 Ves. jun. 226;) though a collateral power to charge the real estate of the donor of the power by the will of the donee, may admit execution by a will executed by two witnesses only; the charge, in such case, being in fact imposed by the instrument creating the power, not by the will, which merely directs the appropriation of

the alteration of tenures by the statute of Charles the second, amounts to the whole of their landed property, except their copyhold tenements.

that which the owner has, previously, by deed *inter vivos*, put beyond his own control. (*Jones v. Clough*, 2 Ves. sen. 365.) However, it is only a *charge* upon lands which can be called into operation by a testamentary instrument, not executed according to the provisions of the statute. If the object of the power be to give a right of disposing of the lands themselves, or the uses of the lands, that object can be carried into effect only by a will duly attested. (*Duke of Marlborough v. Lord Godolphin*, 2 Ves. sen. 76; *Longford v. Eyre*, 1 P. Wms. 741.)

It has been already intimated, that it has been matter of controversy, whether a disposition of property duly made by a *feme covert*, to take place after her death, be, or be not, in technical strictness a *will*; or whether it ought only to be termed an instrument in writing. (*Duke of Marlborough v. Lord Godolphin*, 2 Ves. sen. 75; *Southby v. Stonehouse*, 2 Ves. sen. 612; *Oke v. Heath*, 1 Ves. sen. 139.) The solution of this critical nicety, supposing the question still to remain *in dubio*, may, perhaps, seem not to be very imperiously called for; since it is allowed on all hands, that such a writing, if not a proper will, is at any rate of a testamentary nature; that it is liable to revocation and lapse: (*Hurst v. Morgan*, stated in 1 Hovenden's Supp. to Ves. jun. Rep. 21, whence great part of this note is extracted :) and that, so far as it relates to personal property, it must receive probate in the ecclesiastical court; (*Ross v. Ewer*, 3 Atk. 160; *Cothay v. Sydenham*, 2 Br. 392; *Stevens v. Bagwell*, 15 Ves. 153;) and that the court of Chancery will then give it all the operation of a will;

(*Cotter v. Layer*, 2 P. Wms. 623; *Henley v. Phillips*, 2 Atk. 48;) with this qualification, however, that where the testamentary paper is to operate as the execution of a power, (see *Lloyd v. Abrahall*, stated in 1 Hovenden's Supp. to Ves. jun. Rep. 379, 381,) there, although the judgment of the ecclesiastical court is necessary to declare such instrument to be in the nature of a will, yet the court of Chancery afterwards examines the circumstances of attestation and signature, according to its own rules of evidence; (see *post*, the addition to Mr. Christian's note to p. 378;) and does not trust the ecclesiastical court with the conclusion, that because the writing is testamentary, it must in equity be deemed a good appointment. (*Rich v. Cockell*, 9 Ves. 376.)

When an agreement has been entered into, by contract with the intended husband before marriage, that the wife should have free power to make a will at any time during the coverture, a court of equity will not act upon any subsequent instrument, the object of which is to put that power under control in any respect whatever. (*Parkes v. White*, 11 Ves. 231, 234.) But, though the marital right and interest in his wife's property, may be conclusively renounced by the husband, for himself; and he may have waived the claim which would invalidate the wife's disposition by will of that which, if not disposed of by his consent, must have devolved upon him, as her executor, if he proved the survivor; still, should the husband die before the wife, her will made during coverture will be void as against her next of kin, so far as it attempts to dispose of property

Corporations were excepted in these statutes, to prevent the extension of gifts in mortmain (6); but now, by construction *of the statute 43 Eliz. c. 4, it is held, that a devise to a corporation for a charitable use is valid, as operating in the nature of an *appointment*, rather than of a *bequest*. And indeed the piety of the judges hath formerly carried them great lengths in supporting such charitable uses (*k*); it being held that the statute of Elizabeth, which favours appointments to charities, supersedes, and repeals all former statutes (*l*), and supplies all defects of assurances (*m*): and therefore not only a devise to a corporation, but a devise by a copyhold tenant, without surrendering to the use of his will (*n*), and a devise (nay even a settlement) by tenant in tail, without either fine or recovery, if made to a charitable use, are good by way of appointment (*o*) (7).

Of devises to corporations, to charitable uses.

[* 376]

With regard to devises in general, experience soon showed how difficult and hazardous a thing it is, even in matters of public utility, to depart from the rules of the common law; which are so nicely constructed and so artificially connected together, that the least breach in any one of them disorders for a time the texture of the whole. Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance; for so loose was the construction made upon this act by the courts of law, that bare notes in the handwriting of another person were allowed to be good wills within the statute (*p*). To remedy which, the statute of frauds and perjuries, 29 Car. II. c. 3, directs, that all devises of lands and tenements shall not only be in writing, but signed by the testator (8), or some other person in his

The statute of frauds.

(*k*) Ch. Prec. 272.

(*l*) Gilb. Rep. 45; 1 P. Wms. 248.

(*m*) Duke's Charit. Uses, 84.

(*n*) Moor, 890.

(*o*) 2 Vern. 453; Ch. Prec. 16.

(*p*) Dyer, 72; Cro. Eliz. 100.

consisting of *choses en action*, over which the husband never acquired power; the husband, by giving his consent to such will, could only relinquish his personal rights, not the rights of others; and if the wife, surviving, make no disposition of her property, of the description above alluded to, after the husband's death, she must, as to those particulars, be

held to have died intestate. (*Stevens v. Bagwell*, 15 Ves. 156.)

(6) See *ante*, p. 271, with the note.

(7) See *ante*, pp. 273 and 274, with the notes thereto, for a statement of the qualifications of the text which the statute of 9 Geo. II. c. 36, renders necessary.

(8) The statute is satisfied by a devisor's acknowledgment of his hand-

presence, and by his express direction ; and be subscribed, in his presence, by three or four credible witnesses (9). And

writing, to an attesting witness who did not see him actually execute his will. (*Addy v. Grix*, 8 Ves. 504 ; *Morison v. Turnour*, 18 Ves. 183.) But a distinction must be attended to, where the devise is in execution of a power ; there, it is not the will which is to be attested, but the act of the testator in subscribing that will. (*Wright v. Wakeford*, 17 Ves. 458.)

(9) Mr. Christian observes, that “ copyholds and terms for years are not within the statute, but will pass by any will which is sufficient to bequeath personalty. 2 Atk. 37 ; 2 Bro. 58.”

[But, this must be understood with some distinction. A term, not *in gross*, but vested in trustees to attend the inheritance, so follows the nature of the latter, that, if the owner makes a general devise of the land by a will not so attested as to pass the inheritance, not even the trust of the term will pass. (*Whitchurch v. Whitchurch*, 2 P. Wms. 238 ; *S. C.* Gilb. Eq. Rep. 171.) Also, even as to terms *in gross*, though a testator, being possessed of such, may *transmit* them by the same unsolemn kind of will as he might any other personalty ; yet he cannot *create* them by will, without observing all the forms essential to a devise of real estate ; because the interest in right of which the testator creates the term is *real* estate, and creating the term is a *partial* devise of it. (Mr. Hargrave’s note (3) to Co. Litt. 111 b.)

[Mr. Sugden (in the concluding part of the 2nd section of the 9th chapter of his Treat. on Vend. & Purch.) observes, that a term for years attendant on the inheritance, whether by express declaration, or by implication, is governed by the same rules to which the inheritance itself is subject. Therefore, such a term cannot pass

by a will not executed according to the statute of frauds. (*Tiffin v. Tiffin*, 2 Freem. 66 ; *Villiers v. Villiers*, 2 Atk. 72 ; *Goodright v. Sales*, 2 Wils. 331.) But, Mr. Sugden conceives there are good grounds for holding, that where a term attends the inheritance merely by operation of law, the owner may expressly bequeath it by a will not executed with the solemnities required by the statute ; and, in support of this opinion, he refers to 9 Mod. 127, and 2 Collect. Jurid. 276. —ED.]

Mr. Christian adds, that “ where the testator is a trustee for the benefit of others, he may devise those lands, or the legal estate, by his will ; but the trust estates will not pass by general words, as, all my lands or estates : to pass a trust estate the intention of the testator must be expressly shown. 6 Ves. jun. 577.”

[The case cited by Mr. Christian merely proves, that a trust estate will not pass under a general residuary disposition, where it can be collected that the testator only intended to give the devisee property which he could enjoy beneficially, as his own. Lord Eldon (in the subsequent case of *Lord Braybroke v. Inskip*, 8 Ves. 435,) explains that to be the principle upon which he decided the case referred to by Mr. Christian. It is true, however, that Lord Loughborough (in the earlier case of the *Attorney General v. Buller*, 5 Ves. 340,) said it was then the understanding, that general words would not pass trust estates, unless there was an apparent intention that they should pass ; but he added, the most convenient rule would be the reverse. And the reverse seems now to be fully established. It appears to be quite settled by the later cases, that under a general devise, estates held by the de-

a solemnity nearly similar is requisite for revoking a devise by writing: though the same may be also revoked by burning, cancelling, tearing, or obliterating thereof by the devisor, or in his presence and with his consent (10); as like-

visor in trust will pass, unless, from the context of the will, or from a disposition not consistent with a limited right, and the nature of trust property, it can be collected that he did not mean to pass such estates. (*Lord Braybroke v. Inskip*, 8 Ves. 435; *Attorney General v. Vigor*, 8 Ves. 276; *Ex parte Morgan*, 10 Ves. 103; *Wall v. Bright*, 1 Jac. & Walk. 498.) —ED.]

(10) The 6th section of the statute enacts, that no devise of lands shall be revocable otherwise than by some other *will or codicil* in writing, or *other writing*, declaring the same; or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence and by his direction and consent; but all devises and bequests of lands and tenements shall continue in force, until the same be burnt, cancelled, torn or obliterated by the testator, or by his direction; or unless the same be altered by some other *will or codicil* in writing, or *other writing* of the devisor signed in the presence of three or four witnesses, declaring the same. This clause has been construed disjunctively; and it is settled that, although three witnesses are required to attest and *subscribe* a revocation of a previous will, when such revocation is sought to be effected by a subsequent *will or codicil*; yet if, by any *other writing*, the testator intends barely to revoke his will, without more, he may do this effectually by a writing signed in the presence of three witnesses, who *need not subscribe* their names in his presence, as they must to a *will* of real estate. (*Eccleston v. Speke*, Carthew, 81; *Hoil v. Clark*, 3 Mod. 220; *Grayson v. Atkinson*,

2 Ves. sen. 458.) For, however singular the difference between the fifth and the sixth sections of the statute of frauds may appear; and though it be difficult to suppose the legislature *meant* to institute one mode of revocation so nearly approaching, and yet not exactly conformable to, the mode prescribed for making a disposition of lands; still, as it *has* specified what shall be sufficient to revoke, the enactment is conclusive. And there is certainly nothing repugnant to the common law, in declaring that an act which might not be sufficient to give, shall be sufficient to revoke. (*Ex parte the Earl of Ilchester*, 7 Ves. 372; *Ellis v. Smith*, 1 Ves. jun. 13.) But where the revocation of a devise is attempted to be effected by an instrument purporting to be also a *will*, disposing of the property; if it be not duly executed as such, within the fifth section of the statute of frauds, although such instrument contain express words of revocation, it will not let in the heir; for, the meaning of a second will must be to give to the second devisee what it takes from the first, without any consideration had to the heir; and if the second devisee, owing to the defectiveness of the disposition in his favour, can take nothing, the first devisee will lose nothing. (*Onions v. Tyrer*, 1 P. Wms. 345; *S. C. Prec. in Cha.* 460; *Eccleston v. Speke*, Carth. 80.)

There can be no doubt that the contents, or substance, of a testamentary instrument may be established, though the instrument itself cannot be produced, upon satisfactory proof being given that it was duly made by the testator, and was not revoked by him;

wise *impliedly*, by such a great and entire alteration in the

the last point may be disposed of, either by showing that the instrument existed after the testator's death; or that it was destroyed in his lifetime without his privity or consent. (*Davis v. Davis*, 2 Addams, 224; *Foster v. Foster*, 1 Addams, 408.) It is also well settled, that, in legal consideration, a will may be cancelled without being revoked. The cancelling is an equivocal act, and, in order to operate as a revocation, must be done *animo revocandi*. (*Burtonshaw v. Gilbert*, Cowp. 52; *Johnstone v. Johnstone*, 1 Phillim. 466; *Scruby and Finch v. Fordham*, 1 Addams, 78.) Thus, cancelling a former will, on a presumption that a latter, devising the same lands to the same uses, was effective, would be no revocation of the former, if the latter proved to be void. (*Onions v. Tyrer*, 3 P. Wms. 345.) But, although the cancellation of a will does not *necessarily* infer an intentional abandonment of the dispositions contained therein, nor, consequently, any intended revocation of the will; still, this is the *ordinary* inference: and in order to bar its application to any particular case of cancelling, two things at least are requisite; first, it must be proved that the cancelled paper once existed as a *finished* will; or at any rate one finally approved, if not completely executed, by the testator. (*Roose v. Mouldsdales*, 1 Addams, 131; *Warburton v. Burrows*, 1 Addams, 388; see, however, *Popple v. Cunison*, 1 Addams, 381;) secondly, it must be clearly shown that the testator adhered to it throughout in mind and intention, notwithstanding the cancellation: (*Lord John Thynne v. Stanhope*, 1 Addams, 54;) restricting, however, this latter *dictum*, to a certain extent, by the qualification established in *Onions v. Tyrer*, in cases where a substituted will becomes inoperative.

Where a testator has executed duplicates of his will, and retained one part only in his own possession; if he destroyed that part, the legal presumption would be, that he intended to revoke his will altogether; and the duplicate left in the hands of another would not avail. (*Sir Edward Seymour's case*, cited 3 P. Wms. 345.) If the testator himself had possession of both parts, the same presumption would hold, though it would be weaker. And even if, having both in his possession, he *altered one*, and then destroyed *that which he had altered*, there also, it has been said, the presumption of intended total revocation would exist; but still weaker and more capable of being rebutted. (*Pemberton v. Pemberton*, 13 Ves. 310.)

Lord Mansfield considered it settled, that, if a man by a second will revokes a former, yet, if he keeps the first will undestroyed, and afterwards destroys the second, the first will is thereby revived: (*Harwood v. Goodright*, Cowp. 91;) considerable doubt, however, has been judicially expressed on this head; and it seems that it must be treated as a question of intention, to be decided according to the circumstances of each particular case. (*Moore v. Metcalfe*, Phillim. 400, and on appeal before the court of delegates, *ibid.* 419; *Hooton v. Head*, 3 Phillim. 32; *Usticke v. Bawden*, 2 Addams, 125; *Braham v. Burchell*, 3 Addams, 268.) A codicil added merely for a particular purpose (such, for instance, as changing an executor, but *confirming the will* in all *other respects*;) will not have the effect of setting up again a part of the will which a former codicil had revoked. (*Crosbie v. M'Doual*, 4 Ves. 616, and see *post*, p. 379, note.)

The obliteration of part of a will, operates as a revocation only *pro tanto*. (*Larkins v. Larkins*, 3 Bos. & Pull. 21; *Short v. Smith*, 4 East, 429; *Scruby*

circumstances and situation of the devisor, as arises from marriage and the birth of a child (*q*) (11).

(*q*) *Christopher v. Christopher*, Scacch. 6 Jul. 1771; *Spragge v. Stone*, at the Cockpit, 27 Mar. 1773, by Wil-

mot, De Grey, and Parker. See pag. 502.

and *Finch v. Fordham*, 1 Addams, 78.) But, the obliteration of a codicil may have the effect of cancelling an interlineation in a will, if it clearly appear that the testator, by obliterating the codicil, intended to renounce its object, and not merely the *mode* of effecting it. (*Utterson v. Utterson*, 3 Ves. & Bea. 123.) And as a codicil is, *prima facie*, dependent on the will, cancellation of the will is, generally, an implied revocation of the codicil: there have, indeed, been cases where a codicil has appeared to be so independent of, and unconnected with, the will, that, under circumstances, the codicil has been established, though the will has been held invalid. Such cases have turned upon plain intention, repelling the legal presumption, and showing that the testator designed to leave the codicil operative, notwithstanding the revocation of the will. (*Medlycott v. Assheton*, 2 Addams, 231.)

A second will being no revocation of a former one, further than as it is inconsistent therewith, (*Harwood v. Goodright*, Cowp. 90; *S. C.* in Dom. Proc. 7 Br. P. C. 349, fol. ed.,) it will not be enough to prove that a second will was made, without producing it, and showing it to be not merely different from, but incompatible with, the former. Otherwise, the fraudulent suppression of a second will, which was intended merely as a confirmation, might be made to operate as a revocation. (*Hitchins v. Basset*, 3 Mod. 208, affirmed in Dom. Proc. Show. P. C. 149.) It would be an untenable position, to maintain that a devisor, by making a second will in terms large enough to include all his property, must, necessarily, have meant to revoke a former will:

to have this effect, it must be shown that, the disposition of the property made by the two wills is inconsistent. It would be an assumption of what is not a necessary consequence, to say that, by his second will, the testator must have intended either to confirm, or to revoke, the dispositions contained in the first will: there is a third proposition,—he might not have contemplated to do either, but to make a mere collateral disposition. (*Thomas v. Evans*, 2 East, 494.)

Certainly, where a testator has by a codicil expressly revoked the whole of a previous devise, and has declared over again all the trusts, it is in his new disposition alone that the testamentary title to his property must be sought. There may be strong ground for supposing, that it was by a mere slip he omitted to dispose of part by the codicil as he had done by his will; but this omission no court can supply. (*Holder v. Howell*, 8 Ves. 103.)

However, where an instrument revoking bequests, bears, upon the face of it, evidence that it was entirely grounded upon misinformation or mistake, the bequests made by the will remain good. (*Campbell v. French*, 3 Ves. 323. See 1 Hovenden on Frauds, 296, *et seq.*, where the doctrine of revocation is treated more at length.)

(11) Revocations of wills disposing of lands, may be implied by operation of law, notwithstanding the statute of frauds, and without reference to the intent of the testator. (*Cave v. Holford*, 3 Ves. 653; *Brydges v. Duchess of Chandos*, 2 Ves. jun. 430.) Thus, the least alteration or new modelling of the devised estate, subsequently to the will, operates as a revocation. (*Sparrow v. Hardcastle*, 3 Atk. 802 ;

Decisions on the construction of the statute.

In the construction of this last statute, it has been adjudged that the testator's name, written with his own hand,

Williams v. Owens, 2 Ves. jun. 599.) And if a deviser, after making his will, puts the whole interest in the lands devised out of himself, by any conveyance whatever, it is a revocation, although he immediately takes back the very same estate; (*Parsons v. Freeman*, 3 Atk. 747; *Vawser v. Jeffery*, 2 Swanst. 274. See *ante*, p. 357, note (13) to chapter 21;) or, although without express limitation, it results to him. (*Harmood v. Oglander*, 6 Ves. 222; *Cave v. Holford*, 3 Ves. 659. See *ante*, p. 296, with note (1) to chapter 20.) Upon the same principles, a binding contract for the sale of lands devised is, in equity, as much a revocation as a conveyance of the lands would be at law. (*Cotter v. Laver*, 2 P. Wms. 624; *Attorney General v. Vigor*, 8 Ves. 289.) The will, it seems, would not be set up again, even by an abandonment of the contract in the testator's lifetime. (*Bennet v. Earl of Tankerville*, 19 Ves. 178.)

It should be observed, that, if the owner of an unqualified equitable fee devises it by will, and afterwards takes a conveyance of the unqualified legal fee, this is no revocation, because the conveyance was incident to the equitable fee; just as a partition is no revocation, because incident to the estate of tenants in common; (see *ante*, p. 185;) though, as before observed, any qualified conveyance of the legal fee, or the least addition to the mere object of partition, however slight the modification, would operate a revocation. (*Ward v. Moore*, 4 Mad. 372; *Rose v. Conynghame*, 11 Ves. 554; *Knollys v. Alcock*, 7 Ves. 564; *Rawlins v. Burgess*, 2 Ves. & Bea. 387.)

If a conveyance be intended only for a particular limited purpose, (supposing that purpose is merely to give

a security for money, *Vawser v. Jeffery*, 2 Swanst. 273; *Brain v. Brain*, 6 Mad. 228,) this will not revoke a previous devise of the estate so conveyed, further than is necessary for that express purpose. (*Parsons v. Freeman*, 3 Atk. 748.) Upon this ground, a devise of real estate is not held to be revoked merely because a commission of bankruptcy has issued against the testator; for, the bankrupt laws take the property out of the bankrupt only for the purpose of paying his creditors; and from the moment the debts are paid, the assignees are mere trustees for the bankrupt. (*Charman v. Charman*, 14 Ves. 585.) Thus, also, if a person mortgage an estate which he has devised, although such mortgage be not merely by lease and release, but by fine, this, in equity, will be a revocation only *pro tanto*. (*Casborne v. Scarfe*, 1 Atk. 606; *Rider v. Wager*, 2 P. Wms. 334.) Even a mortgage in fee to the devisee, does not revoke the devise. (*Baxter v. Dyer*, 5 Ves. 664.) Upon similar reasoning, a subsequent lease does not revoke, though it qualifies, a previous devise of the property. (*Lambe v. Parker*, 2 Freem. 284; *Doe v. Wegg*, 6 T. R. 710.) The case would be the same, although such lease were made to the devisee himself; for the deviser might naturally choose to reserve a rent during his lifetime: but this reason would fail if the lease were made to commence after the testator's death;—that would be a revocation of the devise *in toto*, for the two dispositions would be altogether inconsistent. (*Coke v. Bullock*, Cro. Jac. 49; *Hodgkinson v. Wood*, Cro. Car. 24.)

A feoffment of lands, previously devised, may fail, for want of due livery of seisin; yet, the intent of the feoffor being apparent, the devise will

at the beginning of his will, as, "I, John Mills, do make
"this my last will and testament," is a sufficient signing,

be revoked. (*Ex parte the Earl of Ilchester*, 7 Ves. 370.) The same rule holds as to a bargain and sale, which, though not enrolled before the testator's death, is a revocation. (*Sparrow v. Hardcastle*, 3 Atk. 802; *Vawser v. Jeffery*, 2 Swanst. 274.) Even a grant, which, from the incompetency of the party in whose favour it was made, cannot take effect, may operate as a revocation of a previous will, disposing of the same subject; (*Beard v. Beard*, 3 Atk. 72;) and if, after a devise, a man convey his freehold estate, by lease and release, to trustees, to the use of himself and his heirs until his marriage, and, after his marriage, to himself for life, with the usual remainders; though the party should die before marriage, this will amount to a revocation. (*Earl of Lincoln's case*, 2 Freem. 202, confirmed on appeal, in *Dom. Proc.* Show. P.C. 154; *Arthur v. Bockenham*, Fitz-Gib. 241; and see *Doe v. Pott*, 2 Dougl. 722; *Goodtitle v. Otway*, 7 T. R. 220.)

A conveyance, or other instrument, obtained by such fraud and covin as would render it a nullity even at common law, cannot, of course, revoke a will; (*Hicks v. Morse*, Ambl. 215;) but, in what cases a deed, though liable to be impeached in equity, and ordered to be delivered up as improperly obtained, may, notwithstanding, operate a revocation, is, perhaps, hardly settled. Where the party executing thought that by such conveyance his will was revoked, and where a re-conveyance would be necessary to remedy the fraud, Lord Alvanley was of opinion that the impeached instrument, though set aside and made ineffectual for other purposes, would still be a revocation. (*Hawes v. Wyatt*, 2 Cox, 268.) Lord Thurlow thought differently, when the same case was

brought before him by appeal; (see 3 Brown, 157;) Lord Alvanley, however, remained firm in his opinion; (*Harmood v. Oglander*, 6 Ves. 215; *Ex parte the Earl of Ilchester*, 7 Ves. 374;) and Lord Eldon appears to have inclined in favour of the same doctrine. (*Attorney General v. Vigor*, 8 Ves. 283.)

Generally speaking, a devise of a leasehold interest is revoked, if, after such devise, the testator surrenders the old lease and takes a renewal; (*Marwood v. Turner*, 3 P. Wms. 170; *Rudstone v. Anderson*, 2 Ves. sen. 419; *Hone v. Medcraft*, 1 Br. 263; *Abney v. Miller*, 2 Atk. 597;) but the context of the will may, it seems, control this construction: (*James v. Dean*, 11 Ves. 390, and 15 Ves. 239; *Carte v. Carte*, 3 Atk. 176; *S. C.* Ridgw. 222; *Stirling v. Lidyard*, 3 Atk. 199;) the question in these cases turns upon the intention of the testator, to be collected from the language of his will. (*Slatter v. Noton*, 16 Ves. 201; *Colegrave v. Manby*, 6 Mad. 84; *S. C.* on appeal, 2 Russ. 252.)

Where a single man, after devising his whole estate, marries, and has issue, a revocation of the will has been presumed, where the deviser has left his widow and issue unprovided for; (*Kenebel v. Scrafton*, 2 East, 542; *Wilkinson v. Adam*, 1 Ves. & Bea. 465; *Moore v. Moore*, 1 Phillim. 433; *Wright v. Surmuda*, 2 Phillim. 267, n.;) this presumption, however, like all others, may be rebutted. (*Gibbens v. Cross*, 2 Addams, 455.) Both the principles and practice apply equally in favour of a posthumous child. (*Doe v. Lancashire*, 5 T. R. 59.) But it rather seems, that neither marriage alone, nor the birth of children alone, will, without other special circumstances, revoke a

without any name at the bottom (*r*); though the other is the safer way (12). It has also been determined, that though the witnesses must all see the testator sign, or at least acknowledge the signing, yet they may do it at different times (*s*). But they must all subscribe their names as witnesses *in his presence*, lest by any possibility they should mistake the instrument (*t*) (13). And, in one case determined by the court of King's Bench (*u*), the judges were extremely strict in

(*r*) 3 Lev. 1.

(*t*) 1 P. Wms. 740.

(*s*) Freem. 486; 2 Ch. Cas. 109;
Pr. Ch. 185.

(*u*) Stra. 1253.

will. (*Shepherd v. Shepherd*, 5 T. R. 52, n; *Doe v. Barford*, 4 Mau. & Sel. 12. See, however, *Johnstone v. Johnstone*, 1 Phillim. 467, 474.)

Of course there could be no good ground for presuming that a will of real estate was revoked by the subsequent marriage of the testator, who was at the time he made such will, a widower having children, of whom one was his heir apparent. In such case, to hold the will revoked as to the real estate, on account of the birth of children of a second marriage, would only have the effect of letting the eldest son by the first marriage into the whole. (*Sheath v. York*, 1 Ves. & Bea. 397; and see 7 Ves. 366.) But, where a testator, after having made a provision by will for children by his then subsisting marriage, becomes a widower, and afterwards marries again, and has a family by his second wife; the ecclesiastical court may, perhaps, on reasonable grounds, declare the will revoked as to the personal estate, thereby letting in the after-born children to participate with those of the first marriage. (*Hollway v. Clark*, 1 Phillim. 342; *Emerson v. Boville*, 1 Phillim. 344. See, however, *Thompson v. Shepherd*, 2 Cox, 165, 168; *Johnstone v. Johnstone*, 1 Phillim. 472. It is at present, (May, 1836,) under the consideration of our legislators whether marriage shall not, in all cases, operate as a revocation of a previous will.

(12) Mr. Christian, in his note upon the text, says, "I conceive that writing the name at the beginning would never be considered a signing according to the statute, unless the whole will was written by the testator himself: for whatever is written by a stranger after the name of the testator, affords no evidence of the testator's assent to it, if the subscription of his name in his own hand is not subjoined." [See *Coles v. Trecothick*, 9 Ves. 248; *Morison v. Turnour*, 18 Ves. 183; *Stokes v. Moore*, 1 Cox, 223.—Ed.]

(13) Mr. Christian observes, that "it has been determined to be in his presence, if he is apprised at the time of the attestation of the witnesses, and was in a situation from which he might have seen the witnesses subscribe their names. As in a case where the testator's carriage was drawn opposite the windows of an attorney's office, in which the witnesses attested the will, this was clearly determined to be in the testator's presence. 1 Bro. 99. [See *Brodrick v. Brodrick*, 1 P. Wms. 239; *Doe v. Manifold*, 1 Mau. & Sel. 296.] The object of this requisition in the statute is, to prevent the testator and the witnesses from being imposed upon by the substitution of another instrument, or a fabricated will. Hence the attestation of a will is void, if at the time the testator is in a state of insensibility. (Doug. 229.)"

regard to the credibility, or rather the competency, of the witnesses: for they would not allow any legatee, nor by consequence a creditor, where the legacies and debts were charged on the real estate, to be a competent witness to the devise, as being too deeply concerned in interest not to wish the establishment of the will; for, if it were established, he gained a security for his legacy or debt from the real estate, whereas otherwise he had no claim but on the personal assets. This determination, however, alarmed many purchasers and creditors, and threatened to shake most of the titles in the kingdom that depended on devises by will. For, if the will was attested by a servant to whom wages were due, by the apothecary or attorney whose very attendance made them creditors, or by the minister of the parish who had any demand for tithes or ecclesiastical dues (and these are the persons most likely to be present in the testator's last illness), and if, in such case, the testator had charged his real estate with the payment of his debts, the whole will, and every disposition therein, so far as related to real property, were held to be utterly void. This occasioned the statute 25 Geo. II. c. 6, which restored both the competency and the credit of such *legatees*, by declaring void all legacies (14) given to witnesses, and thereby removing all possibility of their interest affecting their testimony. The same statute likewise established the competency of *creditors*, by directing the testimony of all such creditors to be admitted, but leaving their credit (like that of all other witnesses) to be considered, on a view of all the circumstances, by the court *and jury before whom such will shall be contested. And [* 378] in a much later case (*v*) the testimony of three witnesses who were creditors, was held to be sufficiently credible, though the land was charged with the payment of debts; and the reasons given on the former determination were said to be insufficient (15).

(*v*) M. 31 Geo. II. ; 4 Bur. I. 430.

(14) This extends to devises of lands, and every interest given to the witnesses.—CH.

(15) A person who signs his name as witness to a will, by this act of attestation, solemnly testifies the sa-

nity of the testator. Should such witness afterwards attempt to impeach his own act, and to prove that the testator did not know what he was doing when he made (what purported to be) his will; though such

By statute 3 & 4 W. & M. c. 14, creditors by bond or other specialties, may recover against the devisee, as well as the heir, of tenants in fee-simple.

Another inconvenience was found to attend this new method of conveyance by devise; in that creditors by bond and other specialties, which affected the *heir*, provided he had assets by descent, were now defrauded of their securities, not having the same remedy against the *devisee* of their debtor. To obviate which, the statute 3 & 4 W. & M. c. 14, hath provided, that all wills and testaments, limitations, dispositions, and appointments of real estates, by tenants in fee-simple, or having power to dispose by will, shall (as against such creditors only) be deemed to be fraudulent and void (16): and that such creditors may maintain their actions jointly against both the heir and the devisee (17).

testimony will be far indeed from conclusive, (*Hudson's case*, Skin. 70; *Digg's case*, cited *ibid.*,) and Lord Mansfield held, that a witness impeaching his own act, instead of finding credit, deserved the pillory; (*Walton v. Shelley*, 1 T. R. 300; *Lowe v. Jolliffe*, 1 W. Bla. 366; S. C. 1 Dick. 389; *Goodtitle v. Clayton*, 4 Burr. 2225;) yet Lord Eldon held that the evidence of such parties was not to be entirely excluded; admitting, however, that it is to be received with the most scrupulous jealousy. (*Bootle v. Blundell*, 19 Ves. 504; *Howard v. Braithwaite*, 1 Ves. & Bea. 208.) And Sir John Nicholl has laid it down as a distinct rule, that no fact stated by any witness open to such just suspicion can be relied on, where he is not corroborated by other evidence. (*Kinleside v. Harrison*, 2 Phillim. 499; and see *Burrowes v. Lock*, 10 Ves. 474, with the additions to Mr. Christian's note to the next paragraph.)

(16) See the statutes cited *ante*, in pp. 260 & 340, which provide more effectually for the payment of just debts.

(17) Mr. Christian observes, that "a devise to raise a portion for younger children according to an agreement before marriage, and a devise for the payment of debts, are ex-

ceptions in the statutes." [And they still continue so, under the recent enactments, it is not necessary, therefore, that the descent of the estate should be broken. It is enough if it appear, upon the face of the will, that the testator intended to break it. A mere *charge* is not indeed a *legal* interest, in such case; it is not a *devise* to any one: but it is a declaration of intention, upon which a court of equity will fasten; and whether the descent be broken or not, the charge will constitute *equitable* assets. (*Shiphard v. Lutwidge*, 8 Ves. 30; *Kidney v. Coussmaker*, 12 Ves. 154; *Foley's case*, 2 Freem. 49; *Hungerford v. Earl*, *Ibid.* p. 121; *Hickson v. Witham*, *Ibid.* case 12 in Append. to 2nd edit.) And where the testator has directed payment of his debts to be paid out of the "rents and profits" (if no words limiting the devise, expressly or by implication, to *annual* profits be used, (*Ivy v. Gilbert*, 2 P. Wms. 19; *Mills v. Banks*, 3 P. Wms. 7,) the estate may be sold. (*Lingard v. Earl of Derby*, 1 Br. 311; *Ridout v. Earl of Plymouth*, 2 Atk. 105; *Bootle v. Blundell*, 19 Ves. 528; S. C. 1 Meriv. 233; *Anonym.* 1 Vern. 104; *Allan v. Backhouse*, 1 Ves. & Bea. 75.) It has also been declared that, devisees in trust for payment of debts need not wait for a decree of a court of equity

A will of lands, made by the permission and under the control of these statutes, is considered by the courts of law not so much in the nature of a testament, as of a conveyance declaring the uses to which the land shall be subject; with this difference, that in other conveyances the actual *subscription* of the witnesses is not required by law (*w*), though it is prudent for them so to do, in order to assist their me-

The nature and operation of a devise of lands.

(*w*) See pag. 307, 308.

for raising the money; but, without that, may fairly raise it by sale or mortgage (unless where it is directed to be raised by a perception of rents and profits); and the court of Chancery, if the matter be afterwards brought before it, will support the transaction. (*Earl of Bath v. Earl of Bradford*, 2 Ves. sen. 590.)—ED.]

“The execution of a will in a court of law is proved by calling one of the subscribing witnesses, who proves that the testator executed his will by signing and sealing in his presence, and in the presence of the other two subscribing witnesses. But if a bill is filed to establish a will, all the subscribing witnesses living must be examined, unless they are abroad, then their handwriting must be proved, as if they were dead. 5 Ves. jun. 411.”

[See the note to *Lord Carrington v. Payne*, in 1 Hovenden's Suppl. to Ves. jun. Rep. p. 517, where this subject is discussed more at length, and the leading authorities collected. It is there observed, that the court of Chancery deems an heir entitled to evidence of his ancestor's sanity at the time of the execution of his will, (see note 15 to this page,) from *every one* of those whom the statute has placed round a testator at such a time as guards against fraud. (*Harris v. Ingledew*, 3 P. Wms. 93; *Wallis v. Hodgson*, 2 Atk. 56; *Abrams v. Winshup*, 1 Russ. 527.) This is not a mere technical rule. The design of this provision of the statute was to prevent wills from being set up which ought not; and it often operates si-

lently, but forcibly, by intestacy: (*Hindson v. Kersey*, 4 Burn's Eccl. L. 91; *Bootle v. Blundell*, 19 Ves. 500; *S. C. Coop.* 138 :) but when the best endeavours have been used to discover, and bring forward an attesting witness; if those endeavours are fruitless, the witness must be considered as dead. (*Anonym.* Godbolt, 326; *M'Kenire v. Fraser*, 9 Ves. 6; *James v. Parnell*, 1 Turn. & Russ. 417.) And it is not only when a witness is abroad, (*Wood v. Stane*, 8 Pr. 615,) that an exception to the general rule of complete examination is reasonable: that rule will, in like manner, be relaxed, if, owing to any other cause, one of the witnesses cannot be made amenable to the jurisdiction of the court: (*Fry v. Wood*, 1 Atk. 445 :) this last circumstance, indeed, seems to afford the most substantial reason for a departure from the general rule; since, notwithstanding a witness may be abroad, a commission may, if necessary, (though the proceeding is inconvenient,) be sent out to examine him; and an account may be decreed in the mean time, before the return of the commission, although there may not be proper evidence upon which the will can be declared formally and finally proved. (*Fitzherbert v. Fitzherbert*, 4 Br. 430; *Grayson v. Atkinson*, 2 Ves. sen. 460; *Wood v. Stane*, 8 Pr. 615; *Binfield v. Lambert*, 1 Dick. 337.)

[Of course, if one of the witnesses become insane, he must be considered as if he were dead. (*Bernett v. Taylor*, 2 Ves. 382.)—ED.]

mory when living, and to supply their evidence when dead : but in devises of lands such subscription is now absolutely necessary, by statute, in order to identify a conveyance which in its nature can never be set up till after the death of the devisor. And upon this notion, that a devise affecting lands is merely a species of conveyance, is founded this distinction between such devises and testaments of personal chattels ; that the latter will operate upon whatever the testator dies possessed of, the former only upon such real estates as were his at the time of executing and publishing his will (*x*) (18). Wherefore no after-purchased

[* 379] *lands will pass under such devise (*y*), unless, subsequent to the purchase or contract (*z*), the devisor republishes his will (*a*) (19) (20).

(*x*) 1 P. Wms. 575 ; 11 Mod. 148.

(*y*) Moor. 255 ; 11 Mod. 127.

(*z*) 1 Ch. Cas. 39 ; 2 Ch. Cas. 144.

(*a*) Salk. 238.

(18) Every devise of real estate is deemed *specific* ; (*Hill v. Cock*, 1 Ves. & Bea. 175 ; *Milnes v. Slater*, 8 Ves. 305 ;) and being considered in the nature of an appointment of particular lands to the devisee, it has been held a necessary consequence of this principle, (whether the principle itself be wise or not—a question which, whilst this note is going through the press, is under the consideration of parliament,) that no man can legally devise lands to which he has not a legal title at the date of the appointment and of his death ; nor can such a devise be held good in equity, where the equitable title at least was not in the devisor at the first of those periods, and the same estate, whether clothed or not with the legal title, continued in him up to his death : (*Harwood v. Goodright*, Cowp. 90 ; *Howe v. Earl Dartmouth*, 7 Ves. 147 ; *Rose v. Conynghame*, 11 Ves. 554 ; *Brudenell v. Boughton*, 2 Atk. 272 :) with this qualification, however :—it is possible for the estate to have been divested by disseisin, in the time intervening between the date of the will and the testator's death, and yet, (the disseisin being purged by re-entry,)

the will may stand good, without republication. (*Goodtitle v. Otway*, 1 Bos. & Pull. 603, citing the leading case of *Brunker v. Cook*, 11 Mod. 128.) And even though a testator was disseised, at the time of making his will, of lands thereby devised, still, if he be remitted before his death, it should seem that the devise would be good ; for, if re-entry, according to the language of all the cases and text books, has relation *to all intents and purposes* to the time of the disseisin, and the disseisee when remitted, is held to have had possession *ab initio*, (*Monkton v. Pashley*, 2 Lord Raym. 977,) then, a will of lands, notwithstanding it was executed when the devisor had only *jus ad rem*, not *in re*, may operate as a good devise. (*Attorney General v. Vigor*, 8 Ves. 282.) That, as a general rule, subject to some qualifications there stated, a devise becomes inoperative if the testator conveys the devised lands away after he has made his will, notwithstanding he may take back the very same estate in those lands, see *ante*, p. 376, note.

(19) A codicil duly executed, and attested by three witnesses, if such

We have now considered the several species of common assurances, whereby a title to lands and tenements may be

The general rules for the construction of deeds and wills.

codicil clearly refer to, and adopt, a previous unattested will, amounts to a re-execution and re-publication of that will: and a devise of land by the unattested will, which, if it stood alone, would be inoperative as to real estate, will be made good by the codicil. (*De Bathe v. Lord Fingal*, 16 Ves. 168.) Whatever objections this doctrine of constructive re-publication may be open to, it is a point now clearly established, that, as a general rule, a codicil duly attested does amount to such re-publication. (*Hulme v. Heygate*, 1 Meriv. 294.) It is equally clear, that a re-publication of a will makes the will speak as of the time of such re-publication; (*Long v. Aldred*, 3 Addams, 51;) and, consequently, that lands purchased in the interval between the first making of the will and its republication, may pass under a *general* devise contained in the will: but, where the will contains a particular description of the lands thereby devised, no subsequent will can apply to lands purchased after the making of the will; for, the particular description given in the will must defeat any more extended effect of the re-publication. (*Heylin v. Heylin*, Cowp. 132.) Other circumstances besides those of locality, in the description of the lands devised, are sufficient to control the effect and operation of a codicil: thus, for instance, a codicil confirming the beneficial interests given in the testator's lands by his will, but appointing new trustees to whom he devises the legal estate in his "said" lands, may exclude the ordinary operation of a republication, and prevent lands purchased after the date of the will from passing by such devise. (*Bowes v. Bowes*, as determined on appeal in *Dom. Proc.* 2 Bos. & Pull. 506.) But, where no special intention to the contrary ap-

pears, the effect of a codicil *per se*, and independently of any intention, is, to bring down the will to the date of the codicil, making the will speak as of that date. (*Goodtitle v. Meredith*, 2 Mau. & Sel. 14; *Pigott v. Waller*, 7 Ves. 123.) And though the codicil relate (as it did in the case of *Pigott v. Waller*, just cited) only to personalty; yet, if it be executed by three witnesses, it republishes a previous devise of land. (*Rogers v. Browning & Pittis*, 1 Addams, 37.) It should be observed, that a re-publication in general terms, whereby a man ratifies and confirms his will, ratifies and confirms it with *every* codicil which has been added to it; and when by any codicil the will has been in part revoked, the mere re-publication of the will does not set up again any gift which has been so revoked. (*Crosbie v. M'Doual*, 4 Ves. 616; *Monck v. Lord Monck*, 1 Ball & Beat. 306; *Izard v. Hurst*, 2 Freem. 224; *Drinkwater v. Falconer*, 2 Ves. sen. 626.)

As lands which, at the time, have been contracted for by, but not actually conveyed to, a testator, will pass under a general devise of his estates; (*Capel v. Girdler*, 9 Ves. 500; *Broome v. Monck*, 10 Ves. 605;) it follows, from the principles already stated, that any lands for which the testator has entered into a valid contract before he republishes his will, must, unless a special intent to the contrary appear, pass under his said will. (*Gibson v. Lord Montfort*, 1 Ves. sen. 494.)

(20) Mr. Christian observes, that "if an estate is given to A. and his heirs, or to A. and the heirs of his body, or any interest whatever to A., and A. dies before the testator, the devise is lapsed and void, and the heirs of A. can claim no benefit from the devise. (*White v. White*, 6 T. R. 518; 1 Bro. 219; Doug. 330.)"

transferred and conveyed from one man to another. But before we conclude this head, it may not be improper to take notice of a few general rules and maxims, which have been laid down by courts of justice for the construction and exposition of them all. These are,

1. It must be favourable and reasonable, and according to common understanding, and the intent of the parties.

1. That the construction be *favourable*, and as near the minds and apparent intents of the parties, as the rules of law will admit (*b*). For the maxims of law are, that “*verba intentioni debent inservire* ;” and “*benigne interpretamur chartas propter simplicitatem laicorum*.” And therefore the construction must also be *reasonable*, and agreeable to common understanding (*c*).

2. Where there is no ambiguity in the language, no intendment can be made contrary thereto ; but, where the *intention* is clear, the strict sense of the words used need not be considered.

2. That *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est* (*d*) : but that where the *intention* is clear, too minute a stress be not laid on the strict and precise signification of *words* ; *nam qui hæret in litera, hæret in cortice*. Therefore, by a grant of a remainder a reversion may well pass, and *e converso* (*e*). And another maxim of law is, that “*mala grammatica non vitiat chartam* ;” neither false English nor bad Latin will destroy a deed (*f*). Which, perhaps, a classical critic may think to be no unnecessary caution.

Bad grammar or false Latin will not vitiate a deed.

3. The construction must be upon the entire deed, and not upon disjointed parts of it.

3. That the construction be made upon the entire deed, and not merely upon disjointed parts of it. “*Nam ex antecedentibus et consequentibus fit optima interpretatio*” (*g*). And *therefore that every part of it be (if possible) made to take effect : and no word but what may operate in some shape or other (*h*). “*Nam verba debent intelligi cum effectu, ut res magis valeat quam pereat*” (*i*).

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4. The deed must be taken most strongly against the maker, and in favour of the other party.

4. That the deed be taken most strongly against him that is the agent or contractor, and in favour of the other party. “*Verba fortius accipiuntur contra proferentem*.” As, if tenant in fee-simple grants to any one an estate for life, generally, it shall be construed an estate for the life of the grantee (*j*). For the principle of self-preservation will make men sufficiently careful not to prejudice their own

(*b*) And. 60.

(*c*) 1 Bulstr. 175 ; Hob. 304.

(*d*) 2 Saund. 157.

(*e*) Hob. 27.

(*f*) 10 Rep. 133 ; Co. Litt. 223 ;

2 Show. 334.

(*g*) 1 Bulstr. 101.

(*h*) 1 P. Wms. 457.

(*i*) Plowd. 156.

(*j*) Co. Litt. 42, [and see *ante*, p.

121.]

interest by the too extensive meaning of their words; and hereby all manner of deceit in any grant is avoided; for men would always affect ambiguous and intricate expressions, provided they were afterwards at liberty to put their own construction upon them. But here a distinction must be taken between an indenture and a deed-poll: for the words of an indenture, executed by both parties, are to be considered as the words of them both; for, though delivered as the words of one party, yet they are not his words only, because the other party hath given his consent to every one of them. But in a deed-poll, executed only by the grantor, they are the words of the grantor only, and shall be taken most strongly against him (*k*). And, in general, this rule, being a rule of some strictness and rigour, is the last to be resorted to; and is never to be relied upon, but where all other rules of exposition fail (*l*).

Distinction between indentures and deeds-poll.

5. That, if the words will bear two senses, one agreeable to, and another against law, that sense be preferred which is most agreeable thereto (*m*). As, if tenant in tail lets a lease to have and to hold during life generally, it shall be construed to be a lease for his own life only, for that stands with the law; and not for the life of the lessee, which is beyond his power to grant.

5. If the words will bear two senses, one agreeable to, the other against law, the former will be preferred.

*6. That, in a deed, if there be two causes so totally repugnant to each other that they cannot stand together, the first shall be received and the latter rejected (*n*): wherein it differs from a will; for there, of two such repugnant clauses, the latter shall stand (*o*). Which is owing to the different natures of the two instruments; for the first deed and the last will are always most available in law (21).

6. In deeds, if there be two clauses totally repugnant to each other, the last shall be rejected; in wills, the first.

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(*k*) Co. Litt. 134.

(*n*) Hardr. 94.

(*l*) Bacon's Elem. c. 3.

(*o*) Co. Litt. 112.

(*m*) Co. Litt. 42.

(21) Mr. Christian observes, that "such was held to be the law in the time of Lord Coke; but now, where the same estate is given by the testator to two persons in different parts of the will, they are construed to take the estate as joint-tenants, or tenants in common, according to the limitations of the estates and interests devised. (3 Atk. 493; Harg. Co. Litt.

112 b.)"

[Nothing is better established, as a general rule, than that effect ought to be given to every word of a will: (*Collett v. Lawrence*, 1 Ves. jun. 270; *Gray v. Minnethorpe*, 3 Ves. 105 :) but, if two parts of a will are totally irreconcilable, it was Lord Alvanley's repeatedly expressed opinion, that the latter ought to prevail; and that the

Yet in both cases we should rather attempt to reconcile them (*p*).

7. A devise must be most favourably expounded, to further the intent of the devisor.

7. That a devise be most favourably expounded (22), to pursue if possible the will of the devisor, who for want of advice or learning may have omitted the legal or proper phrases. And therefore many times the law dispenses with the want of words in devises, that are absolutely requisite in all other instruments. Thus, a fee may be conveyed without words of inheritance (*q*); and an estate-tail without words of procreation (*r*) (23). By a will also an estate may

(*p*) Cro. Eliz. 420; 1 Vern. 30.

(*r*) See pag. 115.

(*q*) See pag. 108.

subsequent words must be taken as an indication of a subsequent intention. (*Constantine v. Constantine*, 6 Ves. 102; *Sims v. Doughty*, 5 Ves. 247; *Milsom v. Awdrey*, 5 Ves. 467.) This rule, however, was restricted by the learned lord to those cases only, where two parts of a will are totally inconsistent, so that it is impossible for them to coincide: (and see *Jones v. Colbeck*, 8 Ves. 42; *Galland v. Leonard*, 1 Swanst. 163:) in all other cases, as there can be no will at all previous to execution, the testator must be understood to have contemplated every part as taking effect at one and the same time. (*Langham v. Sandford*, 2 Meriv. 11, 22.)—ED.]

(22) See *ante*, p. 108, note.

(23) Mr. Christian observes, that “in the celebrated case of *Perrin v. Blake*, the question was this, *viz.* whether the manifest intention of the testator to give to the first taker an estate for life only ought to prevail, or that he should have an estate-tail, from the construction which would have clearly been put upon the same words, if they had been used in a deed.

“Where technical phrases and terms of art are used alone by a testator, it is fair to presume that he knew their artificial import and signification, and that such was his will and intention; but where he happens to introduce them, and at the same time in effect declares

that I do not intend what conveyancers understand by these words, but my intention is to dispose of my estate directly contrary to the construction generally put upon them; surely courts of justice are, or ought to be, as much at liberty, or rather under an obligation, to effectuate that intention as far as the law will admit, as if he had expressed it in the most apt and appropriate language. (1 Bl. Rep. 672; 4 Burr. 2579; Doug. 329; *Fearne*, 113; *Harg. Tracts*, 351, 490.)”

[It is a sound general rule, that the words made use of by a testator are to be interpreted according to their legal effect and operation, unless it clearly appear that he intended to use them in a different sense: (*Thelluson v. Woodford*, 4 Ves. 329; *Holloway v. Holloway*, 5 Ves. 401; *Deane v. Test*, 9 Ves. 152; *Perry v. Woods*, 3 Ves. 206; *Attorney General v. Vigor*, 8 Ves. 294; *Church v. Munday*, 15 Ves. 406:) but, it would be a manifest perversion of this rule of construction, if it were applied without the qualifications by which it ought to be restricted: no court will entrap a testator in words, not allowing him to explain them. (*Crone v. Odell*, 1 Ball & Beat. 472, 480; *Loveacres v. Blight*, Cowp. 355; *Beauman v. Stock*, 2 Ball & Beat. 413.)—ED.]

pass by mere implication, without any express words to direct its course. As, where a man devises lands to his heir-at-law, after the death of his wife: here, though no estate is given to the wife in express terms, yet she shall have an estate for life by implication (*s*); for the intent of the testator is clearly to postpone the heir till after her death; and, if she does not take it, nobody else can (24). So, also, where a devise is of black-acre to A. and of white-acre to B. in tail, and if they both die without issue, then to C. in fee; here A. and B. have *cross remainders* by implication, and on the failure of either's issue, the other or his issue shall take the whole; and C.'s remainder over shall be postponed till the issue of both shall fail (*t*). But, to avoid confusion, no such cross remainders are allowed between more than two devisees (*u*) (25): and, in general,

(*s*) H. 13 Hen. VII. 17; 1 Ventr. 376.

(*t*) Freem. 484.

(*u*) Cro. Jac. 655; 1 Ventr. 224; 2 Show. 139.

(24) But it has been thought, that, if it is given to a stranger after the wife's death, the devise raises no implication in favour of the wife, for it may descend to the heir during the life of the wife, which possibly may have been the testator's intention. (Cro. Jac. 75.)—CH.

[And see, to the same effect, *Upton v. Lord Ferrers*, 5 Ves. 806; and *Fawlkner v. Fawlkner*, 1 Vern. 22, with the authorities cited in Mr. Raithby's note thereto. It is, indeed, quite an unquestionable rule, that plain words of gift to some person capable of taking, or words of necessary implication, are required to disinherit an heir-at-law. (*Berry v. Usher*, 11 Ves. 92; *Tregonwell v. Sydenham*, 3 Dow, 210; *Gardner v. Sheldon*, Vaugh. 262.)—ED.]

(25) Mr. Christian observes, that "the contrary has for some time been fully established; and this has been laid down by Lord Mansfield as a general rule, *viz.* wherever cross remainders are to be raised between two

and no more, the favourable presumption is in support of cross remainders: where between more than two, the presumption is against them; but the intention of the testator may defeat the presumption in either case." [Cowp. 780, 797.]

"In a case where cross remainders were created by a deed, Lord Kenyon declared, that 'no technical precise form of words is necessary to create cross remainders, though in the verboseness of conveyancers an abundance of words is generally introduced in deeds for this purpose.' (5 T. R. 431.) But cross remainders cannot be created in a deed, as in a will, by implication, not even where the ultimate limitation is given 'in default of all such issue,' which words would probably create cross remainders amongst any number in a will. (5 T. R. 521; 1 East, 416.)

"In a will there may be cross remainders amongst any number by implication, where it is the manifest intention of the testator, though he has

[* 382] where any implications are allowed, they must be such as are *necessary* (or at least highly **probable*) and not merely *possible* implications (*w*) (26). And herein there is no distinction between the rules of law and of equity; for the will, being considered in both courts in the light of a limitation of uses (*x*), is construed in each with equal favour and benignity, and expounded rather on its own particular circumstances, than by any general rules of positive law.

Conclusion.

And thus we have taken a transient view, in this and the three preceding chapters, of a very large and diffusive subject, the doctrine of common assurances: which concludes our observations on the *title* to things real, or the means by which they may be reciprocally lost and acquired. We have before considered the *estates* which may be had in them, with regard to their duration or quantity of interest, the time of their enjoyment, and the number and connexions of the persons entitled to hold them: we have examined the *tenures*, both ancient and modern, whereby those estates have been, and are now, holden: and have distinguished the object of all these inquiries, namely, things real, into the corporeal or substantial, and incorporeal or ideal *kind*; and have thus considered the rights of real property in every light wherein they are contemplated by the laws of England. A system of laws that differs much from every other system, except those of the same feudal origin, in its notions and regulations of landed estates; and which therefore could in this particular be very seldom compared with any other.

The subject which has thus employed our attention is of very extensive use, and of as extensive variety. And yet, I am afraid, it has afforded the student less amusement

(*w*) Vaugh. 262.

(*x*) Fitzg. 236; 11 Mod. 153.

given the estates to the *respective* heirs of their bodies. (2 East, 36.)"

(26) No implication, unquestionably, ought to rest on mere conjecture, (*Cave v. Holford*, 3 Ves. 676,) but neither is it required that every inference should have the force of a mathematical demonstration, and be absolutely irresistible; and it has been held enough if the whole circumstan-

ces, taken together, afford such an inference as leaves no doubt in the mind of the judge who has to decide; provided the question is not of a nature to exclude all implication. (*Hartly v. Harle*, 5 Ves. 546; *Bootle v. Blundell*, 19 Ves. 517; *Gittins v. Steele*, 1 Swanst. 28; *Wilkinson v. Adam*, 1 Ves. & Bea. 466.)

and pleasure in the pursuit, than the matters discussed in the preceding volume. To say the truth, the vast alterations which the doctrine of real property has undergone from the conquest to the present time; the infinite determinations upon points that continually arise, and which have been heaped one upon another for a course of seven centuries, without any order or *method; and the multiplicity of acts of parliament which have amended, or sometimes only altered, the common law; these causes have made the study of this branch of our national jurisprudence a little perplexed and intricate. It hath been my endeavour principally to select such parts of it as were of the most general use, where the principles were the most simple, the reasons of them the most obvious, and the practice the least embarrassed. Yet I cannot presume that I have always been thoroughly intelligible to such of my readers as were before strangers even to the very terms of art, which I have been obliged to make use of; though, whenever those have first occurred, I have generally attempted a short explication of their meaning. These are indeed the more numerous, on account of the different languages which our law has at different periods been taught to speak; the difficulty arising from which will insensibly diminish by use and familiar acquaintance. And therefore I shall close this branch of our inquiries with the words of Sir Edward Coke (y): “Albeit the student shall not at any one day, do what he can, reach to the full meaning of all that is here laid down, yet let him no way discourage himself but proceed: for on some other day, in some other place,” (or perhaps upon a second perusal of the same,) “his doubts will be probably removed.”

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(y) Proeme to 1 Inst.

CHAPTER XXIV.

OF THINGS PERSONAL.

Of things personal.

UNDER the name of things *personal* are included all sorts of things *moveable*, which may attend a man's person wherever he goes; and therefore, being only the objects of the law while they remain within the limits of its jurisdiction, and being also of a perishable quality, are not esteemed of so high a nature, nor paid so much regard to by the law, as things that are in their nature more permanent and *immoveable*, as lands and houses, and the profits issuing thereout. These, being constantly within the reach, and under the protection of the law, were the principal favourites of our first legislators: who took all imaginable care in ascertaining the rights, and directing the disposition, of such property as they imagined to be lasting, and which would answer to posterity the trouble and pains that their ancestors employed about them: but at the same time entertained a very low and contemptuous opinion of all personal estate, which they regarded as only a transient commodity. The amount of it, indeed, was comparatively very trifling during the scarcity of money and the ignorance of luxurious refinements which prevailed in the feudal ages. Hence it was, that a tax of the *fifteenth*, *tenth*, or sometimes a much larger proportion, of all the moveables of the subject, was frequently laid without scruple, and is mentioned with much unconcern by our ancient historians, though now it would justly alarm our opulent merchants and stock-holders. And

[* 385] *hence, likewise, may be derived the frequent forfeitures inflicted by the common law, of *all* a man's goods and chattels, for misbehaviours and inadvertencies that at pre-

sent hardly seem to deserve so severe a punishment. Our ancient law-books, which are founded upon the feudal provisions, do not therefore often condescend to regulate this species of property. There is not a chapter in Britton or the *Mirroi*, that can fairly be referred to this head; and the little that is to be found in Glanvil, Bracton, and Fleta, seems principally borrowed from the civilians. But, of later years, since the introduction and extension of trade and commerce, which are entirely occupied in this species of property, and have greatly augmented its quantity and of course its value, we have learned to conceive different ideas of it. Our courts now regard a man's personalty in a light nearly, if not quite, equal to his realty: and have adopted a more enlarged and less technical mode of considering the one than the other; frequently drawn from the rules which they found already established by the Roman law, wherever those rules appeared to be well-grounded and apposite to the case in question, but principally from reason and convenience, adapted to the circumstances of the times; preserving withal a due regard to ancient usages, and a certain feudal tincture, which is still to be found in some branches of personal property.

But things personal, by our law, do not only include things *moveable*, but also something more (1): the whole of which is comprehended under the general name of *chattels*, which, Sir Edward Coke says (a), is a French word signifying goods. The appellation is in truth derived from the technical Latin word *catalla*; which primarily signified only beasts of husbandry, or (as we still call them) *cattle*, but in its secondary sense was applied to all moveables in general (b). In the *grand coustumier* of Normandy (c), a *chattel* is described as a mere moveable, but at the same time it is set in opposition to a fief or feud: so that, not *only [* 386] goods, but whatever was not a feud, were accounted chattels. And it is in this latter, more extended, negative sense, that our law adopts it; the idea of goods, or moveables only, being not sufficiently comprehensive to take in every

As to what the law deems personalty.

(a) 1 Inst. 118.

(b) Dufresne, II. 409.

(c) C. 87.

(1) See *ante*, p. 16, note.

thing that the law considers as a chattel interest. For since, as the commentator on the *coustumier* (*d*) observes, there are two requisites to make a fief or heritage, duration as to time, and immobility with regard to place; whatever wants either of these qualities is not, according to the Normans, an heritage or fief; or, according to us, is not a *real* estate: the consequence of which, in both laws is, that it must be a personal estate, or chattel.

Chattels are of two kinds—

Chattels, therefore, are distributed by the law into two kinds; chattels *real*, and chattels *personal* (*e*).

1. Chattels *real*.

1. Chattels *real*, saith Sir Edward Coke (*f*), are such as concern, or savour of, the realty; as, terms for years of land, wardships in chivalry (while the military tenures subsisted), the next presentation to a church, estates by statute-merchant, statute-staple, *elegit*, or the like; of all which we have already spoken. And these are called real chattels, as being interests issuing out of, or annexed to, real estates: of which they have one quality, *viz.* immobility, which denominates them *real*; but want the other, *viz.* a sufficient, legal indeterminate duration: and this want it is, that constitutes them *chattels* (2). The utmost period for which they can last, is fixed and determinate, either for such a space of time certain, or till such a particular sum of money be raised out of such a particular income: so that they are not equal in the eye of the law to the lowest estate of freehold, a lease for another's life: their tenants were considered upon feudal principles, as merely bailiffs or farmers; and the tenant of the freehold might at any time have destroyed their interest, till the reign of Henry VIII. (*g*) (3). A freehold, which alone is a real estate, and seems (as has

(*d*) *Il conviendrait quil fust non mouuable et de duree a tousiours.* fol. 107 a.

(*e*) So too, in the Norman law, *Catoux sont meubles et immeubles: sicomme vrais meubles sont qui transporter se peuvent, et ensuivre le corps; im-*

meubles sont choses qui ne peuvent ensuivre le corps, ni estre transportées, et tout ce qui n'est point en heritage. LL. Will. Nothi, c. 4, *apud* Dufresne, II. 409.

(*f*) 1 Inst. 118.

(*g*) See p. 142,

(2) See *ante*, p. 143.

(3) This, of course, must be understood as relating only to terms of years; and that, with some restrictions: the

statute of Gloucester (passed in the 6th of Edw. I.) gave some, though not complete, protection to termors. (See *ante*, p. 142, note.)

been said) to answer to the fief in Normandy, is conveyed by corporal investiture and *livery of seisin (4); which gives [* 387] the tenant so strong a hold of the land, that it never after can be wrested from him during his life, but by his own act, of voluntary transfer or of forfeiture; or else by the happening of some future contingency, as, in estates *pur auter vie*, and the determinable freeholds mentioned in a former chapter (*h*). And even these, being of an uncertain duration, may, by possibility, last for the owner's life; for the law will not presuppose the contingency to happen before it actually does, and till then the estate is, to all intents and purposes, a life-estate; and, therefore, a freehold interest. On the other hand, a chattel interest in lands, which the Normans put in opposition to fief, and we to freehold, is conveyed by no seisin or corporal investiture, but the possession is gained by the mere entry of the tenant himself; and it will certainly expire at a time prefixed and determined, if not sooner. Thus, a lease for years must necessarily fail at the end and completion of the term; the next presentation to a church is satisfied and gone the instant it comes into possession, that is, by the first avoidance and presentation to the living; the conditional estates by statutes and *elegit* are determined as soon as the debt is paid; and so guardianships in chivalry expired, of course, the moment that the heir came of age. And if there be any other chattel real, it will be found to correspond with the rest in this essential quality, that its duration is limited to a time certain, beyond which it cannot subsist.

2. Chattels *personal* are, properly and strictly speaking, things *moveable*; which may be annexed to, or attendant on the person of the owner, and carried about with him from one part of the world to another. Such are animals, household stuff, money, jewels, corn, garments, and every thing else that can properly be put in motion, and transferred from place to place. And of this kind of chattels it is, that we are principally to speak in the remainder of this book; having been unavoidably led to consider the nature of chat-

2. Chattels *personal*.

(*h*) Page 120.

(4) See *ante*, p. 104, with the notes annexed thereto; and also the note to p. 143.

[*388] tels real, and their incidents, in the former chapters which were *employed upon real estates: that kind of property being of a mongrel amphibious nature, originally endowed with one only of the characteristics of each species of things; the immobility of things real, and the precarious duration of things personal (5).

Chattel interests being thus distinguished and distributed, it will be proper to consider, first, the nature of that *property*, or dominion, to which they are liable; which must be principally, nay solely, referred to personal chattels: and, secondly, the *title* to that property, or how it may be lost and acquired. Of each of these in its order.

(5) See *ante*, p. 16, and the note thereto.

CHAPTER XXV.

OF PROPERTY IN THINGS PERSONAL.

PROPERTY, in chattels personal, may be either in *possession*; which is where a man hath not only the right to enjoy, but hath the actual enjoyment of, the thing: or else it is in *action*; where a man hath only a bare right, without any occupation or enjoyment. And of these the former, or property in *possession*, is divided into two sorts, an *absolute* and a *qualified* property.

Property in chattels personal may be either in *possession*, or in *action*: the former is divided into two sorts:

I. First then, of property in *possession absolute*; which is where a man hath, solely and exclusively, the right, and also the occupation, of any moveable chattels; so that they cannot be transferred from him, or cease to be his, without his own act or default. Such may be all *inanimate* things, as goods, plate, money, jewels, implements of war, garments, and the like: such also may be all *vegetable* productions, as the fruit or other parts of a plant, when severed from the body of it; or the whole plant itself, when severed from the ground: none of which can be moved out of the owner's possession without his own act or consent, or at least without doing him an injury, which it is the business of the law to prevent or remedy. Of these therefore there remains little to be said.

I. An absolute property, which extends to all inanimate moveable chattels, and to all vegetable productions, when severed from the ground;

But with regard to *animals*, which have in themselves a principle and power of motion, and (unless particularly confined) can convey themselves from one part of the world to another, there is a great difference made with respect to *their several classes, not only in our law, but in the law of nature and of all civilized nations. They are distinguished into such as are *domitæ*, and such as are *feræ naturæ*: some

And also to animals in their nature tame or domestic; but not to wild animals.

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being of a *tame* and others of a *wild* disposition. In such as are of a nature tame and domestic (as horses, kine, sheep, poultry, and the like), a man may have as absolute a property as in any inanimate beings; because these continue perpetually in his occupation, and will not stray from his house or person, unless by accident or fraudulent enticement, in either of which cases the owner does not lose his property (*a*): in which our law agrees with the laws of France and Holland (*b*). The stealing, or forcible abduction, of such property as this, is also felony: for these are things of intrinsic value, serving for the food of man, or else for the uses of husbandry (*c*). But in animals *feræ naturæ* a man can have no absolute property.

The brood of tame animals belongs to the owner of the dam;

Of all tame and domestic animals, the brood belongs to the owner of the dam or mother; the English law agreeing with the civil, that "*partus sequitur ventrem*" in the brute creation, though for the most part in the human species it disallows that maxim(1). And therefore, in the laws of England(*d*), as well as Rome(*e*), "*si equam meam equus tuus prægnantem fecerit, non est tuum sed meum quod natum est.*" And, for this Puffendorf(*f*) gives a sensible reason: not only because the male is frequently unknown; but also because the dam, during the time of her pregnancy, is almost useless to the proprietor, and must be maintained with greater expense and care: wherefore, as her owner is the loser by her pregnancy, he ought to be the gainer by her brood. An exception to this rule is in the case of young cygnets; which belong equally to the owner of the cock and hen, and shall be divided between them(*g*). But here

Cygnets excepted.

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the reasons of the general rule cease, and "*cessante ra*tione*

(*a*) 2 Mod. 319.

(*b*) Vinn. in Inst. l. 2, tit. 1, s. 15.

(*c*) 1 Hal. P. C. 511, 512.

(*d*) Bro. Abr. tit. *Propertie*, 29.

(*e*) Ff. 6. 1. 5.

(*f*) L. of N. l. 4, c. 7.

(*g*) 7 Rep. 17.

(1) But only "for the most part;" if a woman is seduced, she (and not her seducer) is considered, by our modern poor law, as one of "the brute creation," and subject to the legal "maxim" applicable thereto: she, therefore, is made to pay the penalty of her "brutal" confidence in

man; whilst the nobler male specimen of humanity escapes all disagreeable necessity of contributing to support the produce of his lust: see the statute of 3 & 4 Gul. IV. c. 76, ss. 69—72. See also the notes to Vol. I. pp. 445, 447, 458.

“*cessat et ipsa lex:*” for the male is well known, by his constant association with the female; and for the same reason the owner of the one doth not suffer more disadvantage, during the time of pregnancy and nurture, than the owner of the other.

II. Other animals, that are not of a tame and domestic nature, are either not the objects of property at all, or else fall under our other division, namely, that of *qualified, limited, or special* property: which is such as is not in its nature permanent, but may sometimes subsist, and at other times not subsist. In discussing which subject, I shall in the first place show, how this species of property may subsist in such animals as are *feræ naturæ*, or of a wild nature; and then, how it may subsist in any other things, when under particular circumstances.

II. A qualified or special property.

First, then, a man may be invested with a qualified, but not an absolute, property in all creatures that are *feræ naturæ*, either *per industriam, propter impotentiam, or propter privilegium*.

As to the means of acquiring a qualified property in wild animals.

1. A qualified property may subsist in animals *feræ naturæ, per industriam hominis*: by a man's *reclaiming* and making them tame by art, industry, and education; or by so confining them within his own immediate power, that they cannot escape and use their natural liberty. And under this head some writers have ranked all the former species of animals we have mentioned, apprehending none to be originally and naturally tame, but only made so by art and custom: as horses, swine, and other cattle; which, if originally left to themselves, would have chosen to rove up and down, seeking their food at large, and are only made domestic by use and familiarity; and are therefore, say they, called *mansueta, quasi manui assueta*. But however well this notion may be founded, abstractedly considered, our law apprehends the most obvious distinction to be, between such animals as we generally see tame, and are therefore seldom, if ever, found wandering at large, which it calls *domitæ naturæ*: and such creatures as are usually found at liberty, which are therefore supposed to be more emphatically *feræ naturæ*, though it may happen that the latter shall be sometimes tamed and confined by the art and industry of man. Such as are deer in a park, hares or

1. By reclaiming, or making them tame; or by confining them.

rabbits in an inclosed warren, doves in a dovehouse, pheasants or partridges in a mew, hawks that are fed and commanded by their owner, and fish in a private pond or in trunks. These are no longer the property of a man, than while they continue in his keeping or actual possession: but if at any time they regain their natural liberty, his property instantly ceases; unless they have *animus revertendi*, which is only to be known by their usual custom of returning(*h*). A maxim which is borrowed from the civil law(*i*); "*revertendi animus videntur desinere habere tunc, cum revertendi consuetudinem deseruerint.*" The law therefore extends this possession farther than the mere manual occupation; for my tame hawk, that is pursuing his quarry in my presence, though he is at liberty to go where he pleases, is nevertheless my property; for he hath *animus revertendi*. So are my pigeons, that are flying at a distance from their home (especially of the carrier kind), and likewise the deer that is chased out of my park or forest, and is instantly pursued by the keeper or forrester: all which remain still in my possession, and I still preserve my qualified property in them. But if they stray without my knowledge, and do not return in the usual manner, it is then lawful for any stranger to take them(*k*). But if a deer, or any wild animal reclaimed, hath a collar or other mark put upon him, and goes and returns at his pleasure; or, if a wild swan is taken, and marked and turned loose in the river, the owner's property in him still continues, and it is not lawful for any one else to take him(*l*): but otherwise, if the deer has been long absent without returning, or the swan leaves the neighbourhood. Bees also are *feræ naturæ*: but, when hived and reclaimed, a man may have a qualified property in them, by the law of nature(2), *as well as by the civil law(*m*). And to the same purpose, not to say in the same words with the civil law, speaks Bracton(*n*): occupation, that is, hiving or including them, gives the property in

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(*h*) Bracton, l. 2, c. 1; 7 Rep. 17. 16.

(*i*) Inst. 2. 1. 15.

(*m*) Puff. l. 4, c. 6, s. 5; Inst. 2.

(*k*) Finch, L. 177.

1. 14.

(*l*) Crompt. of Courts, 167; 7 Rep.

(*n*) L. 2, c. 1, s. 3.

(2) See *ante*, the note to p. 2.

bees; for, though a swarm lights upon my tree, I have no more property in them till I have hived them, than I have in the birds which make their nest thereon; and therefore if another hives them, he shall be their proprietor: but a swarm, which fly from and out of my hive, are mine so long as I can keep them in sight, and have power to pursue them; and in these circumstances no one else is entitled to take them. But it hath been also said (*o*), that with us the only ownership in bees is *ratione soli*; and the charter of the forest(*p*), which allows every freeman to be entitled to the honey found within his own woods, affords great countenance to this doctrine, that a qualified property may be had in bees, in consideration of the property of the soil whereon they are found.

In all these creatures, reclaimed from the wildness of their nature, the property is not absolute, but defeasible: a property, that may be destroyed if they resume their ancient wildness, and are found at large. For if the pheasants escape from the mew, or the fishes from the trunk, and are seen wandering at large in their proper element, they become *feræ naturæ* again; and are free and open to the first occupant that has ability to seize them. But while they thus continue my qualified or defeasible property, they are as much under the protection of the law, as if they were absolutely and indefeasibly mine; and an action will lie against any man that detains them from me, or unlawfully destroys them. It is also as much felony by common law to steal such of them as are fit for food(*3*), as it is to steal tame animals(*q*): but not so, if they are only kept for pleasure, curiosity, or whim, as dogs, bears, cats, apes, parrots, and singing birds(*r*); because their value is not intrinsic, but depending only on the caprice of the owner(*s*): though it is such an invasion of property as may *amount to a civil

But this property may be destroyed by their regaining their liberty.

(*o*) Bro. Abr. tit. *Propertie*, 37, cites 43 Edw. III. 24.

(*p*) 9 Hen. III. c. 13.

(*q*) 1 Hal. P. C. 512.

(*r*) Lamb. Eiren. 275.

(*s*) 7 Rep. 18; 3 Inst. 109.

(3) But it is not felony to steal such animals of a wild nature, unless they are so confined that the owner can take them whenever he pleases; or, if they

are not confined, unless they are reduced to tameness, and known by the thief to be so. (1 Hawk. b. 1, c. 33, s. 26.)—CH.

injury, and be redressed by a civil action(*t*). Yet to steal a reclaimed hawk is felony both by common law and statute(*u*); which seems to be a relic of the tyranny of our ancient sportsmen. And, among our elder ancestors, the ancient Britons, another species of reclaimed animals, *viz.* cats, were looked upon as creatures of intrinsic value; and the killing or stealing one was a grievous crime, and subjected the offender to a fine: especially if it belonged to the king's household, and was the *custos horrei regii*, for which there was a very peculiar forfeiture(*w*). And thus much of qualified property in wild animals, reclaimed *per industriam*.

2. A qualified property subsists in the owner of the soil, in the young of birds building their nests in the trees thereon, until they are capable of flying.

2. A qualified property may also subsist with relation to animals *feræ naturæ*, *ratione impotentiae*, on account of their own inability. As when hawks, herons, or other birds build in my trees, or coneys or other creatures make their nests or burrows in my land, and have young ones there; I have a qualified property in those young ones till such time as they can fly or run away, and then my property expires(*x*): but, till then, it is in some cases trespass, and in others felony, for a stranger to take them away(*y*). For here, as the owner of the land has it in his power to do what he pleases with them, the law therefore vests a property in him of the young ones, in the same manner as it does of the old ones if reclaimed and confined: for these cannot, through weakness, any more than the others through restraint, use their natural liberty and forsake him.

3. By privilege of hunting and killing game, in exclusion of others.

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3. A man may, lastly, have a qualified property in animals *feræ naturæ*, *propter privilegium*: that is, he may have the privilege of hunting, taking, and killing them, in *exclusion of other persons. Here he has a transient property in these animals, usually called game, so long as they continue within his liberty(*z*); and may restrain any stranger from

(*t*) Bro. Abr. tit. *Trespass*, 407.

(*u*) 1 Hal. P. C. 512; 1 Hawk. P. C. c. 33.

(*w*) "*Si quis felem, horrei regii custodem, occiderit vel furto abstulerit, felis summa cauda suspendatur, capite aream attingente, et in eam grana tritici effundantur, usquedum summitas caudæ tritico co-operiatur.*" Wotton. LL. Wall. l. 3, c.

5, s. 5. An amercement similar to which, Sir Edward Coke tells us, (7 Rep. 18,) there anciently was for stealing swans; only suspending them by the beak, instead of the tail.

(*x*) *Carta de forest.* 9 Hen. III. c. 13.

(*y*) 7 Rep. 17; Lamb. Eiren. 274.

(*z*) Cro. Car. 554; Mar. 48; 5 Mod. 376; 12 Mod. 144.

taking them therein: but the instant they depart into another liberty, this qualified property ceases. The manner in which this privilege is acquired, will be shown in a subsequent chapter.

The qualified property which we have hitherto considered, extends only to animals *feræ naturæ*, when either reclaimed, impotent, or privileged. Many other things may also be the objects of qualified property. It may subsist in the very elements, of fire or light, of air, and of water. A man can have no absolute permanent property in these, as he may in the earth and land; since these are of a vague and fugitive nature, and therefore can admit only of a precarious and qualified ownership, which lasts so long as they are in actual use and occupation, but no longer. If a man disturbs another, and deprives him of the lawful enjoyment of these; if one obstructs another's ancient windows (a) (4),

As to light, air,
and water.

(a) 9 Rep. 58.

(4) See Vol. III. pp. 216, 217. The enjoyment of lights for twenty years, with the acquiescence of the party who, after that time, does any thing to impede such enjoyment, afford so strong a presumption of a right, by grant or otherwise, that, even before the recent act of 2 & 3 Gul. IV. c. 71, it was held that, unless the exercise of the right were contradicted or explained, a jury ought to support it. (*Darwin v. Upton*, 2 Saund. 175 c, in note; *Cross v. Lewis*, 2 Barn. & Cress. 689; 4 D. & R. 238, S. C.) This rule, however, was qualified in cases to which the custom of the city of London applied, permitting houses to be raised, upon ancient foundations, to any height the owner pleased, notwithstanding such additional elevation might obscure and darken the windows of other ancient messuages, unless there was, by agreement, some restriction to the contrary. However, in the recent case of *Shadwell v. Hutchinson*, (2 Carr. & P. N. P. C. 619,) Lord Tenterden held, that the custom ought to be confined to buildings on ancient foundations,

where *all the four walls* belonged to the party; and that no one would be justified by the custom in raising an obstruction by means of those walls of his, so as to darken the lights in a fourth wall belonging to his neighbour. His Lordship also intimated an opinion, *obiter*, but without deciding the question, that, in order to support the custom, the walls so raised ought to be, at least, as old as the lights which they obstructed. The custom is set forth in *Wynstanley v. Lee*, (2 Swanst. 339,) and see also, *Plummer v. Bentham*, (1 Burr. 249.) This custom, though formerly allowed to be good, does not seem to have been favoured at law; and great care was required to plead it properly; (*Hughes v. Keymish*, and *Newell v. Barnarde*, both reported in 1 Bulstr. 116;) though, in a later case (reported anonymously in Comyn, 274,) the custom is said to be founded on good reasons, and that it needed not be pleaded, but might be given in evidence upon the general issue. However, though the custom authorised a

corrupts the air of his house or gardens(b), fouls his

(b) 9 Rep. 59 ; Lut. 92.

party who built on an *old foundation* to raise his walls higher than they formerly stood, although he might thereby obstruct equally ancient lights in an adjacent house ; it is not to be understood that the custom ever extended to buildings on new foundations : (*Hughes v. Keme*, Yelv. 216 ; *Fishmongers' Company v. East India Company*, 1 Dick. 164 :) and to determine the fact whether the buildings were, or were not, on old foundations, a trial at law was often directed, before an injunction issued ; (*Attorney General v. Bentham*, 1 Dick. 277 ; *S. C.* 1 Ves. sen. 543 ;) for, whenever the legal right is doubtful, equity will not interpose before that question is determined, where the nature of the alleged injury does not strongly call for immediate interference. (*Wynstanley v. Lee*, 2 Swanst. 342 ; *Hanson v. Gardiner*, 7 Ves. 308 ; *Morris v. Lessees of Lord Berkeley*, 2 Ves. sen. 435 ; *The Society of Gray's Inn v. Doughty*, 2 Ves. sen. 453 ; *Attorney General v. Nichol*, 16 Ves. 343.) But, an action at law, for a nuisance in obstructing lights, may be brought either by the actual possessor of the premises, or by the party entitled thereto in reversion ; by the one in respect of his possession, and by the other in respect of his inheritance. (*Jesser v. Gifford*, 4 Burr. 2141.) The question, not only as regards claims to the use of light in general cases, but also as that right was formerly qualified by the custom of the city of London, seems set at rest by the statute of 2 & 3 Gul. IV. c. 71, s. 3, which enacts, that where the access and use of light to and for any building shall have been enjoyed therewith for twenty years, without interruption, the right thereto shall be indefeasible ; unless it shall appear that the same

was enjoyed under some particular agreement in writing ; in which case, of course, the right must be subject to the conditions of the agreement.

It would be unreasonable to presume a grant, where no adverse right has ever been exercised against the party who alone was capable of making the grant ; consequently, the usurpation of an easement, or right of way, for twenty years, merely by the acquiescence of a tenant, without the knowledge of his landlord, will not authorise a presumption against the owner of the reversion, or inheritance, but, even in such cases, the origin of the right claimed adversely must be traced, in order to repel the doctrine of presumption. It will not be enough to show, that the hereditaments which are deteriorated by the alleged encroachments have been, for twenty years, in the occupation of tenants ; it should, also, be made to appear, that the encroachments complained of had their commencement within the period of such tenancy : (*Daniel v. North*, 11 East, 374 ; *Wood v. Veal*, 5 Barn. & Ald. 456 ; *Harper v. Charlesworth*, 4 Barn. & Cress. 591, 6 D. & R. 589, *S. C.* ; *Cross v. Lewis*, 4 Dowl. & Ryl. 239 ; *S. C.* 2 Barn. & Cress. 688 :) and, in order to prevent such claims of rights of way, or of watercourses, or of other similar easements, from becoming indefeasible after forty years uninterrupted enjoyment, the owner of a reversion expectant on the determination of a term of years, must (according to the eighth section of the act cited,) resist the claims within three years next after the determination of the term. The last mentioned section of the act has reference only to rights of way and watercourses ; and from the 3rd and 7th sections it appears, that after the uninterrupt-

water(c)(5), or unpens and lets it out, or if he diverts an ancient water-course that used to run to the other's mill or meadow(d)(6); the law will animadvert hereon as an injury, and protect the party injured in his possession. But the property in them ceases the instant they are out of possession: for, when no man is engaged in their actual occupation, they become again common, and every man has an equal right to appropriate them to his own use.

These kinds of qualification in property depend upon the peculiar circumstances of the subject-matter, which is not capable of being under the absolute dominion of any proprietor. But property may also be of a qualified or special nature, on account of the peculiar circumstances of the owner, when the thing itself is very capable of absolute ownership. *As in case of *bailment*, or delivery of goods to another person for a particular use; as to a carrier to convey to London, to an inn-keeper to secure in his inn, or the like. Here there is no absolute property in either the bailor

Bailments.

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(c) 9 Rep. 59.

(d) 1 Leon. 273; Skin. 389.

ed enjoyment of use of light to any building for twenty years, the claim, though it may have originated in encroachment, will be indefeasible, notwithstanding the parties injured thereby may have been incapable, owing to personal disabilities, or any cause whatever, to resist the encroachments. Formerly, the rule of law (as may be seen by referring to the first of the cases already cited,) allowed a landlord to build up against encroaching lights, though his tenant had acquiesced under the encroachment for above twenty years: upon the same principle which still prevails with respect to ways and watercourses. (See *ante*, p. 35.)

(5) Where the common law affords a convenient remedy, the interposition of the court of Chancery, in cases of nuisance, is rare; and there seems no disposition to extend the equitable interference in such cases; at all events, not by granting *ex parte* injunctions: (*Attorney General v. Cleaver*, 18 Ves. 217 :) but when all pro-

per parties are before the court, and a case of nuisance is stated of such a nature as to be attended with extreme probability of irreparable injury to property or health, certainly an injunction would be granted. (*Crowder v. Tinkler*, 19 Ves. 622; *Attorney General v. Johnson*, 2 Wils. Cha. Ca. 102; *Wynstanley v. Lee*, 2 Swanst. 335; *Mayor of London v. Bolt*, 5 Ves. 130; and see *post*, p. 403.)

(6) See *Robinson v. Lord Byron*, (reported in 1 Br. 588, in 2 Cox, 4, and in 2 Dick. 703,) which appears to have been the first case in which an injunction issued to restrain a defendant from doing acts to prevent water from flowing in regular quantities to a mill. The case is cited, by Lord Eldon, in *Hanson v. Gardiner*, (7 Ves. 388,) and the ground of the case stated to have been the prevention of irreparable mischief, which might have been effected before the right could have been tried at law. (See *ante*, pp. 14, 18; *post*, Vol. III. p. 218.)

or the bailee, the person delivering, or him to whom it is delivered: for the bailor hath only the right, and not the immediate possession; the bailee hath the possession, and only a temporary right. But it is a qualified property in them both; and each of them is entitled to an action, in case the goods be damaged or taken away: the bailee on account of his immediate possession; the bailor, because the possession of the bailee is, mediately, his possession also (*e*). So, also, in case of goods pledged or pawned upon condition, either to repay money or otherwise; both the pledgor and pledgee have a qualified, but neither of them an absolute, property in them: the pledgor's property is conditional, and depends upon the performance of the condition of repayment, &c.; and so too is that of the pledgee, which depends upon its non-performance (*f*). The same may be said of goods distreined for rent, or other cause of distress: which are in the nature of a pledge, and are not, at the first taking, the absolute property of either the distreinor, or party distreined upon; but may be redeemed, or else forfeited, by the subsequent conduct of the latter. But a servant, who hath the care of his master's goods or chattels, as a butler of plate, a shepherd of sheep, and the like, hath not any property or possession, either absolute or qualified, but only a mere charge or oversight (*g*).

Pledges.

Distresses.

Of choses in action.

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Having thus considered the several divisions of property in *possession*, which subsists there only, where a man hath both the right and also the occupation of the thing; we will proceed next to take a short view of the nature of property in *action*, or such where a man hath not the occupation, but merely a bare right to occupy the thing in question; the possession whereof may however be recovered by a suit or action at law: from whence the thing so recoverable is called *a thing, or *chose, in action* (*h*). Thus, money due on a bond is a *chose* in action; for a property in the debt vests at the time of forfeiture mentioned in the

(*e*) 1 Roll. Abr. 607.(*f*) Cro. Jac. 245.(*g*) 3 Inst. 108.

(*h*) The same idea, and the same denomination, of property prevailed in the civil law. "*Rem in bonis nostris habere intelligimur, quotiens ad re-*

"*cuperandum eam actionem habea-*

"*mus.*" (Ff. 41. 1. 52.) And again,

"*æque bonis adnumerabitur etiam, si*

"*quid est in actionibus, petitionibus,*

"*persecutionibus. Nam et hæc in*

"*bonis esse videntur.*" (Ff. 50. 16.

49.)

obligation, but there is no possession till recovered by course of law. If a man promises, or covenants with me, to do any act, and fails in it, whereby I suffer damage, the recompence for this damage is a *chose* in action: for though a right to some recompence vests in me at the time of the damage done, yet what and how large such recompence shall be, can only be ascertained by verdict; and the possession can only be given me by legal judgment and execution. In the former of these cases, the student will observe that the property, or right of action, depends upon an *express* contract or obligation to pay a stated sum: and in the latter it depends upon an *implied* contract, that, if the covenantor does not perform the act he engaged to do, he shall pay me the damages I sustain by this breach of covenant. And hence it may be collected, that all property in action depends entirely upon contracts, either express or implied; which are the only regular means of acquiring a *chose* in action, and of the nature of which we shall discourse at large in a subsequent chapter.

At present we have only to remark, that upon all contracts or promises, either express or implied, and the infinite variety of cases into which they are and may be spun out, the law gives an action of some sort or other to the party injured, in case of non-performance; to compel the wrongdoer to do justice to the party with whom he has contracted, and, on failure of performing the identical thing he engaged to do, to render a satisfaction equivalent to the damage sustained. But while the thing, or its equivalent, remains in suspense, and the injured party has only the right and not the occupation, it is called a *chose* in action; being a thing rather in *potentia* than in *esse*: though the owner may have as absolute a *property in, and be as well entitled to, such things in action, as to things in possession.

Upon the breach of a contract or promise, express or implied, the thing to be recovered, or its equivalent, is a *chose* in action.

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And, having thus distinguished the different *degree* or *quantity* of *dominion* or *property* to which things personal are subject, we may add a word or two concerning the *time* of their *enjoyment*, and the *number* of their *owners*; in conformity to the method before observed in treating of the property of things real.

First, as to the *time* of *enjoyment*. By the rules of the ancient common law, there could be no future property, to

As to the time of enjoyment of things personal.

take place in expectancy, created in personal goods and chattels; because, being things transitory, and by many accidents subject to be lost, destroyed, or otherwise impaired, and the exigencies of trade requiring also a frequent circulation thereof, it would occasion perpetual suits and quarrels, and put a stop to the freedom of commerce, if such limitations in remainder were *generally* tolerated and allowed. But yet in last wills and testaments, such limitations of personal goods and chattels in remainder, after a bequest for life, were permitted(*i*): though originally that indulgence was only shown, when merely the use of the goods, and not the goods themselves, was given to the first legatee(*k*); the property being supposed to continue all the time in the executor of the devisor. But now that distinction is disregarded(*l*): and therefore, if a man, either by deed or will, limits his books or furniture to A. for life, with remainder over to B., this remainder is good. But, where an estate-tail in things personal is given to the first or any subsequent possessor, it vests in him the total property, and no remainder over shall be permitted on such a limitation(*m*)(7). For this, if allowed, would tend to a perpetuity, as the devisee or grantee in tail of a chattel has no method of barring the entail: and therefore the law vests in him at once the entire dominion of the goods, being analogous to the fee-simple which a tenant in tail may acquire in a real estate.

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As to the number of owners.

*Next, as to the *number of owners*. Things personal may belong to their owners, not only in severalty, but also in joint-tenancy, and in common, as well as real estates(8). They cannot indeed be vested in co-parcenary; because they do not descend from the ancestor to the heir, which is necessary to constitute co-parceners. But if a horse, or other personal chattel, be given to two or more, absolutely, they are joint-tenants hereof; and, unless the jointure be severed, the same doctrine of survivorship shall take place

(*i*) 1 Eq. Cas. Abr. 360.

(*k*) Mar. 106.

(*l*) 2 Freem. 206.

(*m*) 1 P. Wms. 290.

(7) See *ante*, p. 175, and the note thereto.

(8) See *ante*, pp. 179—194, chapter 12, with the notes thereto.

as in estates of lands and tenements(*n*). And, in like manner, if the jointure be severed, as, by either of them selling his share, the vendee and the remaining part-owner shall be tenants in common, without any *jus accrescendi* or survivorship(*o*). So, also, if 100*l.* be given by will to two or more, *equally to be divided* between them, this makes them tenants in common(*p*); as we have formerly seen(*q*), the same words would have done in regard to real estates(*9*). But, for the encouragement of husbandry and trade, it is held that a stock on a farm, though occupied jointly, and also a stock used in a joint undertaking, by way of partnership in trade, shall always be considered as common and not as joint property, and there shall be no survivorship therein(*r*).

(*n*) Litt. s. 282 ; 1 Vern. 482.

(*q*) Pag. 193.

(*o*) Litt. s. 321.

(*r*) 1 Vern. 217 ; Co. Litt. 182.

(*p*) 1 Eq. Cas. Abr. 292.

(9) Mr. Christian observes, that “residuary legatees and co-executors are joint-tenants, unless the testator uses some expression which converts their interests into a tenancy in common ; and if one dies before a division or severance of the surplus, the whole

that is undivided will pass to the survivor or survivors. (2 P. Wms. 103 ; 3 Bro. 455.)” [*Thicknesse v. Vernon*, 2 Freem. 84, 2nd edit. ; *Cox v. Queenlock*, Rep. temp. Finch, 176 ; *Jackson v. Jackson*, 9 Ves. 595 ; *White v. Williams*, 3 Ves. & Bea. 75.—Ed.]

CHAPTER XXVI.

OF TITLE TO THINGS PERSONAL BY
OCCUPANCY.

Of the means of
acquiring and
of losing title to
things personal.

WE are next to consider the *title* to things personal, or the various means of *acquiring*, and of *losing*, such property as may be had therein: both which considerations of gain and loss shall be blended together in one and the same view, as was done in our observations upon real property; since it is for the most part impossible to contemplate the one, without contemplating the other also. And these methods of acquisition or loss are principally twelve: 1. By occupancy. 2. By prerogative. 3. By forfeiture. 4. By custom. 5. By succession. 6. By marriage. 7. By judgment. 8. By gift or grant. 9. By contract. 10. By bankruptcy. 11. By testament. 12. By administration.

I. By occupancy—

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And, first, a property in goods and chattels may be acquired by *occupancy*: which we have more than once (a) remarked, was the original and only primitive method of acquiring any property at all; but which has since been restrained and abridged, by the positive laws of society, in order to maintain peace and harmony among mankind. For this purpose, by the laws of England, gifts, and contracts, testaments, legacies, and administrations, have been introduced and countenanced, in order to transfer and continue that property and possession in things personal, which has once been acquired by the owner. And, where such* things are found without any other owner, they for the most part belong to the king by virtue of his prerogative; except in some few instances, wherein the original and natural right

(a) See pag. 2, 3, 8, 258.

of occupancy is still permitted to subsist, and which we are now to consider.

1. Thus, in the first place, it hath been said, that any body may seize to his own use such goods as belong to an alien enemy^(b). For such enemies, not being looked upon as members of our society, are not entitled, during their state of enmity, to the benefit or protection of the laws; and, therefore, every man that has opportunity, is permitted to seize upon their chattels, without being compelled, as in other cases, to make restitution or satisfaction to the owner. But this, however generally laid down by some of our writers, must, in reason and justice, be restrained to such captors as are authorised by the public authority of the state, residing in the crown^(c); and to such goods as are brought into this country by an alien enemy, after a declaration of war, without a safe-conduct or passport. And, therefore, it hath been holden^(d), that where a foreigner is resident in England, and afterwards a war breaks out between his country and ours, his goods are not liable to be seized. It hath also been adjudged, that, if an enemy take the goods of an Englishman, which are afterwards retaken by another subject of this kingdom, the former owner shall lose his property therein, and it shall be indefeasibly vested in the second taker, unless they were retaken the same day, and the owner before sun-set puts in his claim of property^(e). Which is agreeable to the law of nations as understood in the time of Grotius^(f), even with regard to captures made at sea; which were held to be the property of the captors after a possession of twenty-four hours; though the modern authorities^(g) require, that, before the property can* be changed, the goods must have been brought into port, and have continued a night *intra præsidia*, in a place of safe custody, so that all hope of recovering them was lost.

And, as in the goods of an enemy, so also in his *person*, a man may acquire a sort of qualified property, by taking him a prisoner in war^(h); at least till his ransom be paid⁽ⁱ⁾.

(b) Finch, L. 178.

(c) Freem. 40.

(d) Bro. Ab. tit. *Propertie*, 38; 4; Rocc. de Assecur. not. 66. *Forfeiture*, 57.

(e) Ibid.

(f) De j. b. & p. l. 3, c. 6, s. 3.

(g) Bynkersh. quæst. jûr. publ. I.

(h) Bro. Abr. tit. *Propertie*, 18.

(i) We meet with a curious writ of

1. Of the goods of an alien enemy;

And this doctrine seems to have been extended to negro servants (*k*), who are purchased when captives, of the nations with whom they are at war, and are, therefore, supposed to continue, in some degree, the property of their masters who buy them: though, accurately speaking, that property (if it indeed continues (1)), consists rather in the perpetual *service*, than in the *body* or *person* of the captive (*l*).

2. Of unclaimed moveables found upon the surface of the earth, or in the sea;

save waifs, estrays, wrecks, or hidden treasure, which are vested in the king.

3. Of the elements, light, air, and water;

2. Thus again, whatever moveables are found upon the surface of the earth, or in the sea, and are unclaimed by any owner, are supposed to be abandoned by the last proprietor; and, as such, are returned into the common stock and mass of things: and therefore they belong, as in a state of nature, to the first occupant or fortunate finder, unless they fall within the description of waifs, or estrays, or wreck, or hidden treasure; for these, we have formerly seen (*m*), are vested by law in the king, and form a part of the ordinary revenue of the crown.

3. Thus, too, the benefit of the elements, the light, the air, and the water, can only be appropriated by occupancy. If I have an ancient window, overlooking my neighbour's ground, he may not erect any blind to obstruct the light(2): but if I build my house close to his wall, which darkens it, I cannot compel him to demolish his wall; for there the first occupancy is rather in him, than in me. If my neighbour *makes a tan-yard, so as to annoy and render less salubrious the air of my house or gardens, the law will furnish me with a remedy; but, if he is first in possession of the

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trespass in the register (102), for breaking a man's house, and setting such his prisoner at large. "*Quare domum ipsius A. apud W. (in qua idem A. quendam H. Scotum per ipsum A. de guerra captum tanquam prisonem suum, quousque sibi de centum libris, per quas idem H. redemptionem suam cum præfato A. pro vita sua salvan-*

*da fecerat, satisfactum foret, de-
tinuit) fregit, et ipsum H. cepit et
abduxit, vel quo voluit abire per-
misit, &c."*

(*k*) 2 Lev. 201.

(*l*) Carth. 396; Ld. Raym. 147; Salk. 667.

(*m*) Book I. ch. 8. [Vol. I. p. 295.]

(1) See the statute of 5 Geo. IV. c. 113, which amended and consolidated the laws relating to the abolition of the slave trade: and the statute of 3 & 4 Gul. IV. c. 37, for the early and

complete extinction of slavery throughout the British colonies.

(2) See *ante*, p. 395, note, and *post*, Vol. III. p. 217.

air, and I fix my habitation near him, the nuisance is of my own seeking, and may continue (3). If a stream be unoccupied, I may erect a mill thereon, and detain the water; yet not so as to injure my neighbour's prior mill, or his meadow: for he hath by the first occupancy acquired a property in the current (4) (5).

4. With regard likewise to animals *feræ naturæ*, all mankind had by the original grant of the Creator a right to pursue and take any fowl or insect of the air, any fish or inhabitant of the waters, and any beast or reptile of the field: and this natural right still continues in every individual, unless where it is restrained by the civil laws of the country. And when a man has once so seized them, they become while living his *qualified* property, or, if dead, are *absolutely* his own: so that to steal them, or otherwise invade this property, is, according to their respective values, sometimes a criminal offence, sometimes only a civil injury. The restrictions which are laid upon this right, by the laws of England, relate principally to royal fish, as whale and sturgeon, and such terrestrial, aerial, or aquatic animals as go under the denomination of *game*; the taking of which is made the exclusive right of the prince, and such of his subjects to whom he has granted the same royal privilege. But those animals which are not expressly so reserved, are still liable to be taken and appropriated by any of the king's subjects, upon their own territories; in the same manner as they might have taken even game itself, till these civil prohibitions were issued: there being in nature no distinction between one species of wild animals and another, between the right of acquiring property in a hare or a squirrel, in a

4. Of animals *feræ naturæ*, with certain restrictions.

(3) See *ante*, note (4) to p. 395.

(4) See *ante*, note (5) to p. 395.

(5) Mr. Christian observes, that "since the immense extension of the woollen and cotton manufactures by machinery, a stream of water in many situations is become of great value to the owners of the grounds through which it flows. But, though actions respecting injuries to mills, and the right to dam or divert the water in a stream, are now extremely frequent in the country, yet the whole law upon

the subject seems to be comprised in the sentence in the text.

"Any one may build a mill, and may detain or divert the water to supply it, provided he leaves sufficient for all the beneficial purposes to which it had been previously applied below, and provided he does not throw it back upon another's ground, or upon a pre-existent mill above, so as to lessen the *fall* upon its wheel, and thereby to diminish the effect of his neighbour's machinery."

partridge or a butterfly; but the difference at present made, arises merely from the positive municipal law (6).

5. Of growing corn, or other emblements.

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5. To this principle of occupancy also must be referred the method of acquiring a special personal property in corn growing on the ground, or other *emblements*, by any *possessor* *of the land *who hath sown or planted it*, whether he be owner of the inheritance, or of a less estate; which emblements are distinct from the real estate in the land, and subject to many, though not all, the incidents attending personal chattels (7). They were devisable by testament before the statute of wills (*m*), and at the death of the owner shall vest in his executor and not his heir; they are forfeitable by outlawry in a personal action (*n*): and by the statute 11 Geo. II. c. 19, though not by the common law (*o*), they may be distreined for rent arrere. The reason for admitting the acquisition of this special property by tenants who have temporary interests, was formerly given (*p*); and it was extended to tenants in fee, principally for the benefit of their creditors: and, therefore, though *the emblements are assets in the hands of the executor* (8), are forfeitable upon outlawry, and distreinable for rent, they are not in other respects considered as personal chattels; and particularly they are not the object of larceny, before they are severed from the ground (*q*).

6. Of property arising from accession.

6. The doctrine of property arising from *accession* is also grounded on the right of occupancy. By the Roman law, if any given corporeal substance received afterwards an accession by natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled by his right of possession to the property of it under such its state

(*m*) Perk. s. 512.

(*n*) Bro. Abr. tit. *Emblements*, 21; 5 Rep. 116.

(*o*) 1 Roll. Abr. 666.

(*p*) Pag. 122, 146 [and notes].

(*q*) 3 Inst. 109.

(6) See *ante*. pp. 14, 15, and 39; as also *post*, p. 411, n.

(7) Mr. Christian observes, that "the right to emblements does not seem to be aptly referred to the principle of occupancy; for they are the

continuation of an *inchoate*, and not the acquisition of an original right." [See *ante*, p. 10, with the note thereto, and the note to p. 122.—ED.]

(8) See p. 122, n. (7).

of improvement (*r*) (9): but if the thing itself, by such operation, was changed into a different species, as, by making wine, oil, or bread, out of another's grapes, olives, or wheat, it belonged to the new operator, who was only to make a satisfaction to the former proprietor for the materials which he had so converted (*s*). And these doctrines are implicitly copied and adopted by our Bracton (*t*), and have since been *confirmed by many resolutions of the courts (*u*). It hath even been held, that if one takes away and clothes another's wife or son, and afterwards they return home, the garments shall cease to be his property who provided them, being annexed to the person of the child or woman (*w*).

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7. But in the case of *confusion* of goods, where those of two persons are so intermixed, that the several portions can be no longer distinguished, the English law partly agrees with, and partly differs from, the civil. If the intermixture be by consent, I apprehend that, in both laws, the proprietors have an interest in common, in proportion to their respective shares (*x*). But, if one wilfully intermixes his money, corn, or hay, with that of another man, without his approbation or knowledge, or casts gold in like manner into another's melting pot or crucible, the civil law, though it gives the sole property of the whole to him who has not interfered in the mixture, yet allows a satisfaction to the other for what he has so improvidently lost (*y*). But our law, to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded, and endeavoured to be rendered uncertain, without his own consent (*z*) (10).

7. By confusion or mixing of goods.

(*r*) Inst. 2. 1. 25, 26, 31; *Ff.* 6. 1. 5.

(*w*) Moor. 214.

(*s*) Inst. 2. 1. 25. 34.

(*x*) Inst. 2. 1. 27, 28; 1 Vern. 217.

(*t*) L. 2, c. 2 & 3.

(*y*) Inst. 2. 1. 28.

(*u*) Bro. Abr. tit. *Propertie*, 23; Moor. 20; Poph. 38.

(*z*) Poph. 38; 2 Bulstr. 325; 1 Hal. P. C. 513; 2 Vern. 516.

(9) Mr. Christian observes, that "this also has long been the law of England; for it is laid down in the Year-books, that whatever alteration of form any property has undergone, the owner may seize it in its new shape, if he can prove the identity of

the original materials; as, if leather be made into shoes, cloth into a coat, or if a tree be squared into timber, or silver melted or beat into a different figure. (5 Hen. VII. fo. 15; 12 Hen. VIII. fo. 10.)"

(10) In the case of *Lupton v. White*,

8. Of authors in their own original literary compositions.

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8. There is still another species of property, which (if it subsists by the common law,) being grounded on labour and invention, is more properly reducible to the head of occupancy than any other; since the right of occupancy itself is supposed by Mr. Locke (*a*), and many others (*b*), to be founded on the personal labour of the occupant. And this is the right, which an author may be supposed to have in his own original literary compositions: so that no other person without his leave may publish or make profit of the copies. When a man, by the exertion of his rational powers, has produced an original work, he seems to have clearly a *right to dispose of that identical work as he

(*a*) On Gov. part 2, ch. 5.

(*b*) See p. 8.

(15 Ves. 439, *et seq.*) Lord Eldon took rather a different view of our law from that laid down in the text. His lordship thought, that a man who, *by his own tortious act* in confounding two funds, makes it impossible for another to ascertain the amount of his property, is bound himself to furnish the means of distinguishing the two, or to relinquish the whole. What, Lord Eldon asked, are the cases in the old law of a mixture of corn and flour? and he answers his own question thus:—"If one man mixes his corn or flour with that of another, and they were of equal value, the latter must have back the quantity that belongs to him, if that can be ascertained; but, if articles of different value are mixed together, producing a third value, the aggregate of both, and through the fault of the person mixing them the other party cannot tell what was the original value of his property, he must have the whole."

Lord Eldon, therefore, did not think that an account was not to be taken, if that was practicable; but that, where the person whose original dominion is invaded has not the means of furnishing the account, the duty of supplying it rests with the wrong-doer; and if he fails to distinguish the two properties which he has confounded, he loses his

claim to any part thereof. (See also *Lord Chedworth v. Edwards*, 8 Ves. 50.)

The general rule, that, as against an agent who has mixed the property of his employer with his own, so as to render it undistinguishable, the whole may, both at law and in equity, be taken to be the property of the employer, is well settled; but, the same rule does not, in all cases, hold against the creditors of such agent: for instance, if an agent pay money belonging to his employer into his own banking-house, and to his general account, this money may not be distinguishable; but, should the agent become bankrupt, the whole sum which appears to be due to him from the bankers, will go to his assignees, and his employer can only come in as a general creditor under the commission. (*Ex parte Townsend*, 15 Ves. 470.) So, if the bankers had any account with the agent by way of set-off, that set-off would equally affect the money paid in to his account (though being, in truth, the money of his employer), as it would the agent's own money, supposing the bankers to have no notice, displacing their equity. (*Massey v. Banner*, 1 Jac. & Walk. 248.)

pleases, and any attempt to vary the disposition he has made of it, appears to be an invasion of that right. Now the identity of a literary composition consists entirely in the *sentiment* and the *language*; the same conceptions, clothed in the same words, must necessarily be the same composition: and whatever method be taken of exhibiting that composition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies, or at any period of time, it is always the identical work of the author which is so exhibited: and no other man (it hath been thought) can have a right to exhibit it, especially for profit, without the author's consent. This consent may perhaps be tacitly given to all mankind, when an author suffers his work to be published by another hand, without any claim or reserve of right, and without stamping on it any marks of ownership; it being then a present to the public, like building a church or bridge, or laying out a new highway: but in case the author sells a single book, or totally grants the copyright, it hath been supposed, in the one case, that the buyer hath no more right to multiply copies of that book for sale, than he hath to imitate for the like purpose the ticket which is bought for admission to an opera or a concert; and that, in the other, the whole property, with all its exclusive rights, is perpetually transferred to the grantee. On the other hand, it is urged, that though the exclusive property of the manuscript, and all which it contains, undoubtedly belongs to the author, *before* it is printed or published; yet, from the instant of publication, the exclusive right of an author or his assigns to the sole communication of his ideas immediately vanishes and evaporates; as being a right of too subtile and unsubstantial a nature to become the subject of property at the common law, and only capable of being guarded by positive statutes and special provisions of the magistrate.

The Roman law adjudged, that, if one man wrote any thing on the paper or parchment of another, the writing should belong to the owner of the blank materials (c): meaning thereby the mechanical operation of writing, for

Of copyright by
the common
law.

(c) *Si in chartis membranisque tuis carmen vel historiam vel orationem Tilius scripserit, hujus corporis non Tilius sed tu dominus esse videris.* Inst. 2. 1. 33. [See page 404.]

which it directed the *scribe to receive a satisfaction ; for, in works of genius and invention, as in painting on another man's canvas, the same law (*d*) gave the canvas to the painter. As to any other property in the works of the understanding, the law is silent ; though the sale of literary copies, for the purposes of recital or multiplication, is certainly as ancient as the times of Terence (*e*), Martial (*f*), and Statius (*g*). Neither with us in England hath there been (till very lately) any final (*h*) determination upon the right of authors at the common law (11).

Of copyright
by statute.

But whatever inherent copyright might have been supposed to subsist by the common law, the stat. 8 Ann. c. 19, (amended by stat. 15 Geo. III. c. 53,) hath now declared that the author and his assigns shall have the sole liberty of printing and reprinting his works for the term of fourteen years, *and no longer* (*i*) ; and hath also protected that

(*d*) Inst. s. 34.

(*e*) Prol. in Eunuch. 20.

(*f*) Epigr. i. 67 ; iv. 72 ; xiii. 3 ;
xiv. 194.

(*g*) Juv. vii. 83.

(*h*) Since this was first written, it was determined in the case of *Miller v. Taylor*, in B. R. *Pasch.* 9 Geo. III. 1769, that an exclusive and permanent

copyright in authors subsisted by the common law. But afterwards, in the case of *Donaldson v. Becket*, before the House of Lords, 22 Feb. 1774, it was held, that no copyright now subsists in authors, after the expiration of the several terms created by the statute of queen Anne.

(*i*) By statute 15 Geo. III. c. 53.

(11) Mr. Christian observes, that "whether the productions of the mind could communicate a right of property or of exclusive enjoyment in reason and nature ; and if such a moral right existed, whether it was recognised and supported by the common law of England ; and whether the common law was intended to be restrained by the statute of queen Anne ; are questions, upon which the learning and talents of the highest legal characters in this kingdom have been powerfully and zealously exerted.

"These questions were finally so determined, that an author has no right at present beyond the limits fixed by the statute. But, as that determination was contrary to the opinion of Lord Mansfield, of the learned com-

mentator, and of several other judges, every person may still be permitted to indulge his own opinion upon the propriety of it, without incurring the imputation of arrogance.

"No less than eight of the twelve judges were of opinion that this was a right allowed and perpetuated by the common law of England ; but six held, that the enjoyment of it was abridged by the statute of queen Anne, and that all remedy for the violation of it was taken away after the expiration of the terms specified in the act ; and agreeable to that opinion was the final judgment of the lords.

"See the arguments at length of the judges of the King's Bench, and the opinions of the rest, in 4 Burr. 2303."

property by additional penalties and forfeitures: directing farther, that if, at the end of that term, the author himself be living, the right shall then return to him for another term of the same duration (12): and a similar privilege is

some additional privileges in this respect are granted to the universities,

and certain other learned societies.

(12) The statute of 54 Geo. III. c. 156, enacts, that the author of any book, printed and published subsequently to the said act, and the assignee or assigns of such author, shall have the sole liberty of printing and reprinting such book for the full term of twenty-eight years, to commence from the day of first publishing the same; and also, if the author shall be living at the end of that period, for the residue of his natural life; and that if any person, in any part of the British dominions, shall within the terms and times granted and limited by the said act as aforesaid, print, reprint, or import, or cause to be printed, reprinted, or imported, any such book, without the consent of the author, or other proprietor of the copyright, first had in writing; or, knowing the book to be so printed, reprinted, or imported without such consent, shall sell, publish, or expose to sale, or cause to be sold, published, or exposed to sale, or shall have in his possession for sale, any such book, without such consent first had and obtained as aforesaid; then such offender shall be liable to a special action on the case, at the suit of the author or other proprietor of the copyright of such book, and the author shall recover such damages as the jury on the trial of such action, or on the execution of a writ of inquiry thereon, shall give or assess, together with double costs of suit: and every such offender shall also forfeit such book or books, and shall deliver the same to the author or other proprietor of the copyright

thereof, and the said author or proprietor shall make waste paper of such book or books; and every such offender shall also forfeit three-pence for every sheet thereof, either printed or printing, or published or exposed to sale: provided that all actions, suits, bills, indictments, or informations for any offence committed against the said act, shall be brought, sued, and commenced within twelve months next after such offence committed. The title to the copyright of books is directed by the act to be entered at Stationers'-hall, within a limited time, under a penalty of forfeiture of five pounds, together with eleven times the price at which such books shall be sold, or advertised for sale: provided that no failure in making such entry shall in any manner affect the copyright, but shall only subject the person making default to the penalty aforesaid under the said act.

Whenever an action at the suit of the author would lie against a person pirating books, (*Lord Byron v. Johnston*, 2 Meriv. 29; *Hogg v. Kirby*, 8 Ves. 225; *Stockdale v. Onwhyn*, 5 Barn. & Cress. 177, 7 D. & R. 632, S. C.;) or music, (*Platt v. Button*, 19 Ves. 447; *Clementi v. Walker*, 2 Barn. & Cress. 861, 7 D. & R. 598, S. C.), or prints or charts, (*Blackwell v. Harper*, Barnard. Cha. Rep. 120; *Wilkins v. Aikin*, 17 Ves. 425; *Harrison v. Hogg*, 2 Ves. jun. 323; *Longman v. Winchester*, 16 Ves. 271; *Newton v. Cowie*, 4 Bingh. 245, 12 B. Moore, 457, S. C.) a court of equity will grant an injunction, to restrain a

extended to the inventors of prints and engravings, for the term of eight and twenty years, by the statutes 8 Geo. II.

fraud on the author's property; but, where the character of the publication is such that no damages could be recovered in respect thereof at law, equity will refuse to interpose. (*Lawrence v. Smith*, Jacob's Rep. 472; *Walcot v. Walker*, 7 Ves. 2; *Southey v. Sherwood*, 2 Meriv. 440; *Lord and Lady Percival v. Phipps*, 2 Ves. & Bea. 26; *Gee v. Pritchard*, 2 Swanst. 415.) The plaintiff must also, in order to entitle him to an injunction, show the property in the pirated work to be clearly vested in himself; either as the author, or as an assignee, for his own benefit, or in trust for others: and this interest must be distinctly stated in the bill; for, the injunction ought to be warranted by what appears in the bill, not by what is brought forward merely by affidavit. (*Nicol v. Stockdale*, 3 Swanst. 689.)

The collection of materials may establish a claim to copyright in a work, notwithstanding the subject may be obvious to all mankind; and an injunction will issue to stop the publication of a work which is a servile copy of a preceding one, with merely colourable alterations. (*Matthewson v. Stockdale*, 12 Ves. 273, 276; *Butterworth v. Robinson*, 5 Ves. 709; *Tonson v. Walker*, 3 Swanst. 679.) The case would be different if the new work contained, not only alterations, but corrections and improvements of the original work; (*Cary v. Faden*, 5 Ves. 26;) and such additions and corrections may properly be made the subject of copyright. (*Cary v. Longman & Rees*, 1 East, 380.) But, it will not be permitted that one man should, under pretence of quotation, in fact publish another's work, and defraud him of the fruit of his labours: (*Wilkins v. Aikin*, 17 Ves. 424;) for, although an abstract or fair abridgment of a

publication is allowable, (*Dodsley v. Kinnersley*, Ambl. 403; *Gyles v. Wilcox*, Barnard. Cha. Rep. 368; *Bell v. Walker & Debrett*, 1 Br. 451; *Whittingham v. Wooller*, 2 Swanst. 431,) yet a colourable abstract will be restrained. (*Butterworth v. Robinson*, 5 Ves. 709; *Carnan v. Bowles*, 1 Cox, 285; *Macklin v. Richardson*, Ambl. 696; *Gyles v. Wilcox*, 2 Atk. 142.)

No property can be acquired in any article copied, in the same language, from a prior work; (*Barfield v. Nicholson*, 2 Sim. & Stu. 1;) but a translation is as much entitled to protection as an original production. (*Wyatt v. Barnard*, 3 Ves. & Bea. 78.)

Forms of indictments, it has been decided, cannot be the subjects of copyright, nor can a statement of the evidence necessary to support indictments, and subjoined thereto, be so appropriated. And, further, though an author, after the publication of one or more editions of his work, sells the copyright, with an undertaking to prepare and edit the subsequent editions of the work, at a fixed price, he may publish any new matter on the same general subject, in a separate publication on his own account; notwithstanding the insertion of such new matter in the subsequent editions of the work of which he has sold the copyright may be absolutely necessary to their proper completion. (*Sweet v. Archbold*, so held by the Vice Chancellor, in Hil. T. 1828, and by the Lord Chancellor during the sittings after that Term.)

No one who chooses to copy and publish a specification of patents, can thereby acquire a right to restrain another from copying the same; for these are common property. (*Wyatt v. Barnard*, 3 Ves. & Bea. 78.)

When a plaintiff has permitted repeated infringements of his copyright,

c. 13, and 7 Geo. III. c. 38, besides an action for damages, with double costs, by statute 17 Geo. III. c. 57 (13). All which parliamentary protections appear to have been suggested by the exception in the statute of monopolies (14),

for a length of time, equity will not interfere (by injunction, at any rate, whether it may be proper to direct an account to be kept or not,) before the right is determined at law. (*Platt v. Button*, 19 Ves. 448; *Rundell v. Murray*, Jacob's Rep. 316.)

Whether the act of publication abroad makes a work, at once, *publici juris*, may be very questionable; but there can be no doubt that, where an author prints and publishes *abroad only*, or where he does not take prompt measures to publish here, he cannot, after a reasonable time for his publishing here has elapsed, and after some other person, in the regular and fair course of trade, has published the work in this country, sustain an injunction against such person. (*Clementi v. Walker*, 2 Barn. & Cress. 866, 870; 4 D. & R. 603, S.C.)

A *parol* assignment of the copyright of a work may not be sufficient, perhaps, to give the assignee the privileges conferred by the legislature upon the author. (*Power v. Walker*, 3 Mau. & Sel. 9.) But, when a publisher has been induced by such assignment, to employ his capital and attention upon a work, withdrawing them from other matters in which they might possibly have been more profitably employed; and when the author has acquiesced in seeing his *parol* assignment acted upon for a length of time; a court of equity, even if it acknowledged the author's strict right, would probably think his conduct entitled him to no summary relief by injunction, and would leave him to such remedy as he might have at common law. (*Rundell v. Murray*, Jacob's Rep. 316.)

The proprietor of a copyright must

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file a separate bill against each bookseller taking copies of a spurious edition for sale; for, there is no privity between such parties, and the defendants may justify their several acts upon totally dissimilar grounds. (*Dilly v. Doig*, 2 Ves. jun. 487; *Berke v. Harris*, Hardr. 337.)

In cases of alleged piracy of literary property, a reference is usually directed to the Master; (—— v. *Leadbetter*, 4 Ves. 681; *Nicol v. Stockdale*, 3 Swanst. 689;) but, in order to save expense, the court itself will sometimes compare the two works. (*Whittingham v. Wooller*, 2 Swanst. 431.)

Parts of this note and the next are extracted from 2 Hovenden on Frauds, 147, 152.

As to the kind of *prerogative* copyright subsisting in certain publications, as bibles, liturgies, acts of parliament, proclamations, and orders of council, see *post*, p. 410.

(13) Mr. Christian observes, that "the principal differences in these three statutes concerning prints, seem to be these: the 8 Geo. II. gives an exclusive privilege of publishing to those who invent or design any print, for fourteen years only; the 7 Geo. III. extends the term to twenty-eight years absolutely, to all who either invent the design or make a print from another's design or picture; and those who copy such prints within that time, forfeit all their copies, to be destroyed, and five shillings for each copy; the 17 Geo. III. gives the proprietor an action to recover damages and double costs for the injury he has sustained by the violation of his right."

(14) See Vol. IV. p. 159.

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21 Jac. I. c. 3, which allows a royal patent of privilege to be granted for fourteen years to any inventor of a new manufacture, for the sole working or making of the same; by virtue whereof it is held, that a temporary property therein becomes vested in the king's patentee (*k*) (15).

(*k*) 1 Vern. 62.

(15) When the crown, on behalf of the public, grants letters patent, the grantee thereby enters into a contract with the crown, in the benefit of which contract the public are participants; under certain restrictions, affording a reasonable recompence to the grantee, the use of his invention, improvement, and employment of capital, is communicated to the public. If any infringement of a patent be attempted, after there has been an undisputed enjoyment by the patentee under the grant for a considerable time, courts of equity will deem it a less inconvenience to issue an injunction until the right can be determined at law, than to refuse such preventive interference, merely because it is possible the grant of the crown may, upon investigation, prove to be invalid. Such a question is not to be considered as it affects the parties on the record alone; for, unless the injunction issues, *any* person might violate the patent, and the consequence would be, that the patentee must be ruined by litigation. (*Harmer v. Plane*, 14 Ves. 132; *Universities of Oxford and Cambridge v. Richardson*, 6 Ves. 707; *Williams v. Williams*, 3 Meriv. 160.) But, if the patent be a very recent one, and its validity is disputed, an injunction will not be granted before the patentee has established his legal right. (*Hill v. Thompson*, 3 Meriv. 624.)

The grant of a patent, as already stated, is in the nature of a purchase for the public, to whom the patentee is bound to communicate a free participation in the benefit of his invention, at the expiration of the time limited:

(*Williams v. Williams*, 3 Meriv. 160:) if, therefore, the specification of a patent be not so clear as to enable all the world to use the invention, and all persons of reasonable skill in such matters to copy it, as soon as the term for which it has been granted is at an end, this is a fraud upon the public, and the patent cannot be sustained. (*Newbury v. James*, 2 Meriv. 451; *Ex parte Fox*, 1 Ves. & Bea. 67; *Turner v. Winter*, 1 T. R. 605; *Harmer v. Plane*, 11 East, 107.) But, by the statute of 5 & 6 Gul. IV. c. 83, a patentee may, before his specification is disputed by action or suit, enter with the clerk of the patents (having first obtained the attorney general's sanction,) a disclaimer or alteration of any part of the specification, stating the reason for such disclaimer or alteration, which, provided they do not go to extend his exclusive right, shall be deemed part of the letters patent: but any person may enter a *caveat* against the admission of any such disclaimer or alteration.

The enrolment of a patent cannot be dispensed with, upon the ground that, if the specification is made public, foreigners may take advantage of the invention; for, the king's subjects have a right to see the specification: (*Ex parte Koops*, 6 Ves. 599:) nor can the date of a patent be altered after it is once sealed, in order to enlarge the time (four months) allowed by the statute for the enrolment of specifications; even though the case may be a hard one, and the delay has arisen from innocent misapprehension. (*Ex parte Beck*, 1 Br. 577; *Ex*

parte Koops, ubi supra.) And, if a patentee seek, by his specification, more than he is strictly entitled to, his patent is thereby rendered ineffectual, even to the extent to which he would otherwise be entitled; unless he has brought himself within the benefit of the statute of 5 & 6 Gul. IV. c. 83. (*Hill v. Thompson*, 3 Meriv. 629; *Harmer v. Plane*, 14 Ves. 135.)

When a person has invented certain improvements upon an engine, or other subject, for which a patent has been granted, and those improvements cannot be used without the original engine; at the expiration of the patent for such original engine, a patent may be taken out for the improvements; but, before that time there can be no right to make use of the *substratum* protected by the first patent. (*Ex parte Fox*, 1 Ves. & Bea. 67.) And, where industry and ingenuity have been exerted in annexing to the subject of a patent, improvements of such a nature that their value gives an additional value to the

old machine; though a patent may be obtained for such improvements; yet, if the public choose to use the original machine, without the improvements, they may do so without any restriction, at the expiration of the original grant; if the public will abstain from the use of the first invention, in consideration of the superior advantages of the improved instrument, it is well; but the choice must be left open. (*Harmer v. Plane*, 14 Ves. 134.)

A man may have obtained a patent for what he fully believed to be an original invention, but which, in fact, some other person may have discovered or used before. In such case, the king may refer the matter to the judicial committee of the privy council, and if they advise it, the letters patent may be confirmed. (Stat. 5 & 6 Gul. IV. c. 83, s. 2.) By the fourth section of the said statute, the term of a patent may, in special cases, be prolonged for a term not exceeding seven years beyond the time fixed by the original grant.

CHAPTER XXVII.

OF TITLE BY PREROGATIVE AND FORFEITURE.

II. By prerogative—

A SECOND method of acquiring property in personal chattels is by the *king's prerogative*: whereby a right may accrue either to the crown itself, or to such as claim under the title of the crown; as, by the king's grant, or by prescription, which supposes an ancient grant.

to tributes, taxes, and customs payable to the crown.

Such in the first place are all *tributes, taxes, and customs*, whether constitutionally inherent in the crown, as flowers of the prerogative and branches of the *census regalis*, or ancient royal revenue, or whether they be occasionally created by authority of parliament; of both which species of revenue we treated largely in the former volume (1). In these the king acquires, and the subject loses, a property, the instant they become due: if paid, they are a *chose* in possession; if unpaid, a *chose* in action. Hither, also, may be referred all forfeitures, fines, and amercements due to the king, which accrue by virtue of his ancient prerogative, or by particular modern statutes: which revenues created by statute do always assimilate, or take the same nature, with the ancient revenues; and may, therefore, be looked upon as arising from a kind of artificial or secondary prerogative. And, in either case, the owner of the thing forfeited, and the person fined or amerced, lose and part with the property of the forfeiture, fine, or amercement, the instant the king or his grantee acquires it.

[* 409]
The king cannot have a joint

*In these several methods of acquiring property by prerogative, there is also this peculiar quality, that the king can-

(1) See Vol. I. pp. 281—337.

not have a *joint* property with any person in one entire chattel, or such a one as is not capable of division or separation; but where the titles of the king and a subject concur, the king shall have the whole: in like manner as the king cannot, either by grant or contract, become a joint-tenant of a chattel real with another person(*a*), but by such grant or contract shall become entitled to the whole in severalty. Thus, if a horse be given to the king and a private person, the king shall have the sole property: if a bond be made to the king and a subject, the king shall have the whole penalty; the debt or duty being one single chattel(*b*); and so, if two persons have the property of a horse between them, or have a joint debt owing them on bond, and one of them assigns his part to the king, or is attainted, whereby his moiety is forfeited to the crown; the king shall have the entire horse, and entire debt(*c*). For, as it is not consistent with the dignity of the crown to be partner with a subject, so neither does the king ever lose his right in any instance; but where they interfere, his is always preferred to that of another person(*d*): from which two principles it is a necessary consequence, that the innocent, though unfortunate, partner, must lose his share in both the debt and the horse, or in any other chattel in the same circumstances (2).

property with a subject in a chattel not capable of division; but in such case he is entitled to the whole in severalty.

(*a*) See pag. 184.

(*b*) Fitzh. Abr. t. *Dette*, 38; Plowd. 243.

(*c*) Cro. Eliz. 263; Plowd. 323;

Finch, Law, 178; 10 Mod. 245.

(*d*) Co. Litt. 30.

(2) See Vol. I. p. 299. Mr. Christian observes, that "if a joint-tenant of any chattel interest commits suicide, the right to the whole chattel becomes vested in the king. This was decided after much solemn and subtle argument in 3 Eliz. The case is reported by Plowd. 262, Eng. ed. Sir James Hales, a judge of the Common Pleas, and his wife, were joint-tenants of a term for years: Sir James drowned himself, and was found *felo de se*; and it was held that the term did not survive to the wife, but that Sir James's interest was forfeited to the king by the felony, and that it

consequently drew the wife's interest along with it. The argument of Lord Chief Justice Dyer is remarkably curious: 'The felony (says he) is 'attributed to the act; which act is 'always done by a living man, and in 'his lifetime, as my brother Brown 'said; for he said Sir James Hales 'was dead; and how came he to his 'death? It may be answered, by 'drowning; and who drowned him? 'Sir James Hales; and when did he 'drown him? in his lifetime. So 'that Sir James Hales, being alive, 'caused Sir James Hales to die; and 'the act of the living man was the

Wreck, treasure-trove, waifs, estrays, &c.

[* 410]

This doctrine has no opportunity to take place in certain other instances of title by prerogative that remain to be mentioned; as the chattels thereby vested are originally and solely vested in the crown, without any transfer or derivative assignment, either by deed or law, from any former proprietor. Such is the acquisition of property in wreck, in treasure-trove(3), in waifs, in estrays, in royal fish, in swans, and the *like; which are not *transferred* to the sovereign from any former owner, but are originally *inherent* in him by the rules of law, and are derived to particular subjects, as royal franchises(4), by his bounty. These are ascribed to him, partly upon the particular reasons mentioned in the eighth chapter of the former book; and partly upon the general principle of their being *bona vacantia*(5), and therefore vested in the king, as well to preserve the peace of the public, as in trust to employ them for the safety and ornament of the commonwealth.

Copyrights.

There is also a kind of prerogative *copyright*(6) subsisting in certain books, which is held to be vested in the crown upon different reasons. Thus, 1. The king, as the executive magistrate, has the right of promulging to the people all acts of state and government. This gives him the exclusive privilege of printing, at his own press, or that of his grantees, all *acts of parliament, proclamations, and orders of council*. 2. As supreme head of the church, he hath a right to the publication of all *liturgies* and books of *divine service*. 3. He is also said to have a right, by purchase, to the copies of such *law books, grammars, and other compositions*, as were compiled or translated at the expense of the

‘ death of the dead man. And then,
‘ for this offence, it is reasonable to
‘ punish the living man who com-
‘ mitted the offence, and not the dead
‘ man. But how can he be said to be
‘ punished alive, when the punish-
‘ ment comes after his death? Sir,
‘ this can be done no other way but
‘ by divesting out of him, from the
‘ time of the act done in his lifetime,
‘ which was the cause of his death,
‘ the title and property of those things
‘ which he had in his lifetime.’

“ This must have been a case of

notoriety in the time of Shakspeare; and it is not improbable that he intended to ridicule this legal logic by the reasoning of the grave-digger in Hamlet upon the drowning of Ophelia. See Sir J. Hawkins’s note in Stephens’s edition.”

(3) See Vol. I. p. 295.

(4) See *ante*, pp. 37, 40, with the notes thereto.

(5) See Vol. I. p. 298.

(6) See *ante*, p. 407, with the note thereto.

crown. And upon these two last principles combined, the exclusive right of printing the translation of the *bible* is founded.

There still remains another species of prerogative pro- Game.
 perty, founded upon a very different principle from any that
 have been mentioned before; the property of such animals
feræ naturæ, as are known by the denomination of *game*,
 with the right of pursuing, taking, and destroying them:
 which is vested in the king alone, and from him derived to
 such of his subjects as have received the grants of a chase,
 a park, a free warren, or free fishery. This may lead us
 into an inquiry concerning the original of these franchises,
 or royalties, on which we touched a little in a former
 chapter (f): *the right itself being an incorporeal heredi- [* 411]
 tament, though the fruits and profits of it are of a personal
 nature.

In the first place, then, we have already shown, and in- Restrictions on
the taking of
game.
 deed it cannot be denied, that by the law of nature every
 man, from the prince to the peasant, has an equal right of
 pursuing, and taking to his own use, all such creatures as
 are *feræ naturæ*, and therefore the property of nobody, but
 liable to be seized by the first occupant. And so it was
 held by the imperial law, even so late as Justinian's time:
 "*feræ igitur bestię, et volucres, et omnia animalia quę mari,*
 "*cęlo, et terra nascuntur, simul atque ab aliquo capta fue-*
 "*rint, jure gentium statim illius esse incipiunt. Quod enim*
 "*nullius est, id naturali ratione occupanti conceditur*" (g).
 But it follows, from the very end and constitution of society,
 that this natural right, as well as many others belonging to
 man as an individual, may be restrained by positive laws(7),
 enacted for reasons of state, or for the supposed benefit of
 the community. This restriction may be either with respect
 to the *place* in which this right may, or may not, be exer-
 cised; with respect to the *animals* that are the subject of
 this right; or with respect to the *persons* allowed or for-
 bidden to exercise it. And, in consequence of this autho-
 rity, we find that the municipal laws of many nations have
 exerted such power of restraint; have in general forbidden

(f) Pag. 38, 39.

(g) Inst. 2, 1. 12.

(7) See *ante*, p. 8, with the note at the foot thereof.

the entering on another man's grounds, for any cause without the owner's leave; have extended their protection to such particular animals as are usually the objects of pursuit; and have invested the prerogative of hunting and taking such animals in the sovereign of the state only, and such as he shall authorise(*h*). Many reasons have concurred for making these constitutions(8): as, 1. For the encouragement of agriculture and improvement of lands, by giving every man an exclusive dominion over his own soil. 2. For preservation of the several species of these animals, which would soon be extirpated by a general liberty. 3. For prevention of idleness and dissipation in husbandmen, artificers, and *others of lower rank; which would be the unavoidable consequence of universal license. 4. For prevention of popular insurrections and resistance to the government, by disarming the bulk of the people(*i*); which last is a reason oftener meant, than avowed, by the makers of forest or game laws(9). Nor, certainly, in these probi-

(*h*) Puff. L. N. l. 4, c. 6, s. 5.

(*i*) Warburton's Alliance, 324.

(8) See *ante*, pp. 15, 39, 403. The reasons assigned in the text are of very questionable validity. The destruction of agricultural produce in the neighbourhood of close preserves, is matter of notoriety. That game would soon be extirpated in our country, if the game laws were done away with, is a position which is incapable of proof *à priori*; game is no where more abundant than in many of those countries (some of them thickly inhabited, throughout the greater part of Asia for instance,) where game laws are, with the exception of the edict stated in the note to p. 414, unknown. Every day affords me lancholy proofs, that idleness and dissipation amongst the lower ranks are *not* prevented by the existence of the game laws; but, that perpetual breaches of those laws lead, by a seldom failing progression, to every description of profligacy and hardened crime: and it is by no means clear, that, if the stimulus of prohibition were taken away, the passion for

the pursuit of game might not be lessened. The fourth reason suggested by our author in support of the principle of the game laws, is answered by Mr. Christian, in the note of his which is retained below. And Blackstone, in the next page, candidly admits, that the game laws are relics of feudal slavery.

Since this note was first published, the statute of 1 & 2 Gul. IV. c. 32, has been enacted for the purpose of amending the laws in England relative to game; whereby the sale of game is licensed, and every person who takes out a certificate is authorised to kill game, subject to the law of trespass.

(9) Mr. Christian, in his note upon the passage in the text, says, "I am inclined to think that this reason did not operate upon the minds of those who framed the game laws of this country; for, in several ancient statutes, the avowed object is to encourage the use of the long bow, the most effective armour then in use."

bitions is there any *natural* injustice, as some have weakly enough supposed; since, as Puffendorf observes, the law does not hereby take from any man his present property, or what was already his own, but barely abridges him of one means of acquiring a future property, that of occupancy; which, indeed, the law of nature would allow him, but of which the laws of society have, in most instances, very justly and reasonably deprived him (10).

Yet, however defensible these provisions in general may be, on the footing of reason, or justice, or civil policy, we must, notwithstanding, acknowledge, that, in their present shape, they owe their immediate original to slavery. It is not till after the irruption of the northern nations into the Roman empire, that we read of any other prohibitions, than that natural one of not sporting on any private grounds without the owner's leave; and another of a more spiritual nature, which was rather a rule of ecclesiastical discipline, than a branch of municipal law. The Roman or civil law, though it knew no restriction as to *persons* or *animals*, so far regarded the article of *place*, that it allowed no man to hunt or sport upon another's ground, but by consent of the owner of the soil. "*Qui alienum fundum ingreditur, venandi aut aucupandi gratia, potest a domino prohiberi ne ingrediatur*" (k). For, if there can, by the law of nature, be any inchoate imperfect property supposed in wild animals before they are taken, it seems most reasonable to fix it in him upon whose land they are found. And as to the other restriction, which relates to *persons* and not to *place*, the pontifical or canon law (l) interdicts "*venationes, et sylvaticas vagationes cum canibus et accipitribus*," to all *clergymen* without distinction; grounded on *a saying of St. [* 413]

By the Roman law, no man was permitted to hunt on another's land.

And hunting was interdicted to clergymen.

(k) Inst. 2. 1. s. 12.

(l) Decretal, l. 5, tit. 24, c. 2.

(10) Mr. Christian says, "I can by no means accede even to the combined authority of Puffendorf and the learned Judge, that there is not any natural injustice in abridging a person of the means of acquiring a future property. The right of acquiring future property may be more valuable than the right of retaining the present

possession of property. A right of common, like all other rights, must bear a certain value; and it certainly is as great injustice to deprive any one of the right of hunting, fishing, or of digging in a public mine, as it is to take from him the value of that right in money or any other species of private property."

Jerome(*m*)(11), that it never is recorded that these diversions were used by the saints, or primitive fathers. And the canons of our Saxon church, published in the reign of king Edgar(*n*), concur in the same prohibition: though our secular laws, at least after the conquest, did, even in the times of popery, dispense with this canonical impediment; and spiritual persons were allowed by the common law to hunt for their recreation, in order to render them fitter for the performance of their duty: as a confirmation whereof, we may observe, that it is to this day a branch of the king's prerogative, at the death of every bishop, to have his kennel of hounds, or a composition in lieu thereof(*o*)(12).

Origin of the prohibitions respecting game.

But, with regard to the rise and original of our present civil prohibitions, it will be found that all forest and game laws were introduced into Europe at the same time, and by the same policy, as gave birth to the feudal system; when those swarms of barbarians issued from their northern hive, and laid the foundation of most of the present kingdoms of Europe on the ruins of the western empire. For, when a conquering general came to settle the economy of a vanquished country, and to part it out among his soldiers or feudatories, who were to render him military service for such donations; it behoved him, in order to secure his new acquisitions, to keep the *rustici* or natives of the country, and all who were not his military tenants, in as low a condition as possible, and especially to prohibit them the use

(*m*) Decret. part 1, dist. 34, l. 1.

(*o*) 4 Inst. 309, [*post*, p. 427.]

(*n*) Cap. 64.

(11) Viz. *Venatorem nunquam legimus sanctum*.—CH.

(12) Mr. Christian observes, that “when Archbishop Abbot, by an unfortunate accident, had killed a park-keeper, in shooting at a deer with a cross-bow, though it was allowed no blame could be imputed to the archbishop but from the nature of the diversion, yet it was thought to bring such scandal upon the church, than an apology was published upon the occasion, which was warmly and learnedly answered by Sir Henry Spelman,

who maintained that the archbishop was in the exercise of an act prohibited by the canons and ordinances of the church, and that he was even disqualified from exercising his spiritual functions. The king referred the consideration of the subject to the lord keeper and several of the judges and bishops, who recommended it to his majesty to grant his grace a dispensation *in majorem cautelam, si qua forte sit irregularitas*; which was done accordingly. See *Reliquiæ*, Spelm. 107.”

of arms. Nothing could do this more effectually than a prohibition of hunting and sporting; and therefore it was the policy of the conqueror to reserve this right to himself, and such on whom he should bestow it; which were only his capital feudatories, or greater barons. And accordingly we find, in the feudal constitutions(*p*), one and the same law prohibiting the *rustici* in general from carrying arms, and also proscribing the use of nets, snares, or other engines for destroying the game. *This exclusive privilege well suited the martial genius of the conquering troops, who delighted in a sport(*q*) which in its pursuit and slaughter bore some resemblance to war. *Vita omnis* (says Cæsar, speaking of the ancient Germans,) *in venationibus atque in studiis rei militaris consistit* (*r*). And Tacitus in like manner observes, that *quoties bella non ineunt, multum venatibus, plus per otium transigunt* (*s*). And indeed, like some of their modern successors, they had no other amusement to entertain their vacant hours; despising all arts as effeminate, and having no other learning than was couched in such rude ditties as were sung at the solemn carousals which succeeded these ancient huntings. And it is remarkable that, in those nations where the feudal policy remains the most uncorrupted, the forest or game laws continue in their highest rigour. In France, all game is properly the king's; and in some parts of Germany it is death for a peasant to be found hunting in the woods of the nobility(*t*). [* 414]

With us in England also, hunting has ever been esteemed a most princely diversion and exercise. The whole island was replenished with all sorts of game in the times of the Britons; who lived in a wild and pastoral manner, without inclosing or improving their grounds, and derived much of their subsistence from the chase, which they all enjoyed in common. But, when husbandry took place under the Saxon government, and lands began to be cultivated, improved, and enclosed, the beasts naturally fled into the woody and

The king's
forests.

(*p*) Feud. l. 2, tit. 27, s. 5.

(*q*) In the laws of Jenghiz Khan, founder of the Mogul and Tartarian empire, published *A. D.* 1205, there is one which prohibits the killing of all game from March to October; that the court and soldiery might find

plenty enough in the winter, during their recess from war. (Mod. Univ. Hist. iv. 468.)

(*r*) De Bell. Gall. l. 6, c. 20.

(*s*) C. 15.

(*t*) Mattheus de Crimin. c. 3, tit. 1; Carpzov. Practic. Saxonic. p. 2, c. 84.

[* 415]

desert tracts; which were called the forests, and, having never been disposed of in the first distribution of lands, were therefore held to belong to the crown. These were filled with great plenty of game, which our royal sportsmen reserved for their own diversion, on pain of a pecuniary *forfeiture for such as interfered with their sovereign. But every freeholder had the full liberty of sporting upon his own territories, provided he abstained from the king's forests: as is fully expressed in the laws of Canute (v), and of Edward the Confessor (u): "*sit quilibet homo dignus venatione sua, in sylva, et in agris, sibi propriis, et in dominio suo: et abstineat omnis homo a venariis regiis, ubicunque pacem eis habere voluerit:*" which indeed was the ancient law of the Scandinavian continent, from whence Canute probably derived it. "*Cuique enim in proprio fundo quamlibet feram quoquo modo venari permissum*" (w).

The sole and exclusive right to pursue and take game was held to be in the king, and in his grantees.

However, upon the Norman conquest, a new doctrine took place; and the right of pursuing and taking all beasts of chase or *venary*, and such other animals as were accounted *game*, was then held to belong to the king, or to such only as were authorised under him. And this, as well upon the principles of the feudal law, that the king is the ultimate proprietor of all the lands in the kingdom, they being all held of him as the chief lord, or lord paramount of the fee (13); and that therefore he has the right of the universal soil, to enter thereon, and to chase and take such creatures, at his pleasure: as also upon another maxim of the common law, which we have frequently cited and illustrated, that these animals are *bona vacantia*, and, having no other owner, belong to the king by his prerogative. As, therefore, the former reason was held to vest in the king a *right* to pursue and take them any where; the latter was supposed to give the king, and such as he should authorise, a *sole and exclusive* right.

The royal forests extended by the conqueror.

This right, thus newly vested in the crown, was exerted with the utmost rigour, at and after the time of the Norman establishment; not only in the ancient forests, but in the

(v) C. 77.

(u) C. 36.

(w) Steirnhook de Jure Sueon. l.

2, c. 8.

(13) See *ante*, p. 51.

new ones which the conqueror made by laying together vast
 *tracts of country, depopulated for that purpose, and re- [* 416]
 served solely for the king's royal diversion ; in which were
 exercised the most horrid tyrannies and oppressions, under
 colour of forest law, for the sake of preserving the beasts of
 chase : to kill any of which, within the limits of the forest,
 was as penal as the death of a man. And, in pursuance of
 the same principle, king John laid a total interdict upon the The killing of
birds prohibited
by king John.
winged as well as the *four-footed* creation : "*capturam
 avium per totam Angliam interdixit*" (x). The cruel and
 insupportable hardships which these forest laws created to
 the subject, occasioned our ancestors to be as zealous for
 their reformation, as for the relaxation of the feudal rigours,
 and the other exactions introduced by the Norman family ;
 and accordingly we find the immunities of *carta de foresta* Carta de foresta.
 as warmly contended for, and extorted from the king with
 as much difficulty, as those of *magna carta* itself (14). By
 this charter, confirmed in parliament (y), many forests were
 disafforested, or stripped of their oppressive privileges, and
 regulations were made in the regimen of such as remained ;
 particularly (z) killing the king's deer was made no longer a
 capital offence, but only punished by a fine, imprisonment,
 or abjuration of the realm. And by a variety of subsequent
 statutes, together with the long acquiescence of the crown
 without exerting the forest-laws, this prerogative is now
 become no longer a grievance to the subject.

But, as the king reserved to himself the *forests* for his Chases or parks.
 own exclusive diversion, so he granted out from time to time
 other tracts of lands to his subjects, under the names of
chases or *parks* (a), or gave them license to make such in
 their own grounds ; which indeed are smaller forests, in the
 hands of a subject, but not governed by the forest laws :
 and, by the common law, no person is at liberty to take or
 kill any beasts of chase, but such as hath an ancient chase
 or park ; unless they be also beasts of prey.

*As to all inferior species of game, called beasts and fowls Free-warren.
 of warren, the liberty of taking or killing them is another [* 417]
 franchise of royalty, derived likewise from the crown, and

(x) M. Paris, 303.

(z) Cap. 10.

(y) 9 Hen. III.

(a) See pag. 38.

(14) See *post*, Vol. III. p. 72 ; and Vol. IV. pp. 415, 416.

Free-fishery.

called *free-warren*; a word, which signifies preservation or custody: as the exclusive liberty of taking and killing fish in a public stream or river is called a *free-fishery*; of which however no new franchise can at present be granted, by the express provision of *magna carta*, c. 16 (b). The principal intention of granting to any one these franchises or liberties was, in order to protect the game, by giving the grantee a sole and exclusive power of killing it himself, provided he prevented other persons. And no man, but he who has a chase or free warren, by grant from the crown, or prescription, which supposes one, can justify hunting or sporting upon another man's soil; nor indeed, in thorough strictness of common law, either hunting or sporting at all (15).

None but those who have a derivative right from the crown, are by common law entitled to kill game.

Statutes concerning game.

[* 418]

However novel this doctrine may seem to such as call themselves *qualified* sportsmen, it is a regular consequence from what has been before delivered: that the sole right of taking and destroying game belongs exclusively to the king. This appears, as well from the historical deduction here made, as because he may grant to his subjects an exclusive right of taking them; which he could not do, unless such a right was first inherent in himself. And hence it will follow, that no person whatever, but he who has such derivative right from the crown, is by common law entitled to take or kill any beasts of chase, or other game whatsoever. It is true, that, by the acquiescence of the crown, the frequent grants of free warren in ancient times, and the introduction of new penalties of late by certain statutes for preserving the game, this exclusive prerogative of the king is little known or considered; every man that is exempted from these modern penalties, looking upon himself as at liberty to do what he pleases with the game: whereas the contrary is strictly true, that no man, however well *qualified* he *may vulgarly be esteemed, has a right to encroach on the royal prerogative by the killing of game, unless he can show a particular grant of free warren; or a prescription,

(b) *Mirr.* c. 5, s. 2. See pag. 40.

(15) Whether this was strictly so at common law or not, it is now unimportant to inquire. Subject to proceedings for trespass, if he commits it,

every man is authorised by statute to kill game; and no qualification is required except an annual certificate. See *ante*, p. 411, note.

which presumes a grant; or some authority under an act of parliament. As for the latter, I recollect but two instances wherein an express permission to kill game was ever given by statute; the one by 1 Jac. I. cap. 27, altered by 7 Jac. I. cap. 11, and virtually repealed by 22 & 23 Car. II. c. 25, which gave authority, so long as they remained in force, to the owners of free warren, to lords of manors, and to all freeholders having 40*l.* *per annum* in lands of inheritance, or 80*l.* for life or lives, or 400*l.* personal estate, (and their servants,) to take partridges and pheasants upon their own, or their master's, free warren, inheritance, or freehold (16): the other by 5 Ann. c. 14, which empowers lords and ladies of manors to appoint gamekeepers to kill game for the use of such lord or lady; which, with some alteration, still subsists, and plainly supposes such power not to have been in them before (17). The truth of the matter is, that these

(16) Mr. Christian says, he “apprehends that what the learned judge has here stated respecting the first permission, has arisen from a misconception of the subject. The first qualification act is the 13 R. II. c. 13, the title of which is ‘None shall hunt but they who have a sufficient living.’

“This statute clearly admits and restrains their former right: the 1 Jac. I. c. 27, which seems intended for the encouragement of hawking, the most honourable mode of killing game at that time, begins with a general prohibition to all persons whatever to kill game with guns, bows, setting dogs, and nets; but there is afterwards a proviso in the act, that it shall and may be lawful for persons of a certain description and estate to take pheasants and partridges, upon their own lands, in the day-time, with nets. This proviso clearly refers to the preceding prohibition introduced by the statute, and by no means gives a new permission to the persons thus qualified, which they did not possess antecedently to that statute.”

Mr. Christian adds, “he trusts that those who will take the trouble to

examine the statute, will be convinced of the truth of this remark; and that the correction of this error alone, will contribute in some degree to the refutation of the doctrine which the learned judge has advanced in this chapter, and other parts of the Commentaries, *viz.*, that all the game in the kingdom is the property of the king or his grantees, being usually the lords of manors.”

(17) Mr. Christian, in his note upon this passage, says, “Gamekeepers were first introduced by the present qualification act, 22 & 23 Car. II. c. 25; and various regulations have been made respecting them by subsequent statutes.” Mr. Christian then gives a chronological abstract of those statutes, and closes a long note by stating that he “conceives the statute of Car. II. to be the first instance, either in our statutes, reports, or law treatises, in which lords of manors are distinguished from other land-owners with regard to the game thereon.” However this may be, it is now merely a matter of antiquarian research: the 10th, 13th, and 14th sections of 1 & 2 Gul. IV. c. 32, es-

game laws (of which we shall have occasion to speak again in the fourth book of these commentaries) do indeed *qualify* nobody, except in the instance of a gamekeeper, to kill game : but only, to save the trouble and formal process of an action by the person injured, who perhaps too might remit the offence, these statutes inflict *additional* penalties, to be recovered either in a regular or summary way, by any of the king's subjects, from certain persons of inferior rank who may be found offending in this particular. But it does not follow that persons, excused from these additional penalties, are therefore *authorised* to kill game. The circumstance of having 100*l. per annum*, and the rest, are not properly qualifications, but exemptions. And these persons, so exempted from the penalties of the game-statutes, are not only liable to actions of trespass by the owners of the land ; but also, if they kill game within the limits of any royal franchise, they are liable to the actions of such who may have the right of chase or free warren therein.

As to who may
acquire property
in animals *feræ*
naturæ.

[* 419]

*Upon the whole it appears, that the king, by his prerogative, and such persons as have, under his authority, the royal franchises of chase, park, free warren, or free fishery, are the *only* persons who may acquire any property, however fugitive and transitory, in these animals *feræ naturæ*, while living : which is said to be vested in them, as was observed in a former chapter [ch. 13] *propter privilegium* (18).

tablish the right of lords of manors to the game on the wastes and commons within their manors, and authorise them to appoint gamekeepers and grant deputations, to preserve, pursue, or kill the game thereon.

(18) Mr. Christian, in a note upon this passage of the text, impugns the position so “frequently, and even zealously, inculcated by our author, that the common law has *vested the sole property of all the game in England in the king alone*, and of consequence that no man, let his rank and fortune be what they may, is qualified to kill game, or is exempt from the original penalties, unless he possesses some peculiar privilege derived from the king.”

Mr. Christian thinks “this doctrine is unsupported by any prior authority, and that the authorities to the contrary are numerous and irresistible.”

Mr. Christian adds, “it is true that our kings, prior to the *carta de foresta*, claimed and exercised the prerogative of making forests wherever they pleased over the grounds of their subjects : within the limits of these forests certain wild animals were preserved, by severe laws, for the recreation of the sovereign. A district thus bounded at the king's pleasure, might have been granted by the king to any of his subjects who enjoyed the exclusive privilege either of a forest, chase, park, or free warren, according

And it must also be remembered, that such persons as may thus lawfully hunt, fish, or fowl, *ratione privilegii*, have (as

to the extent of the jurisdiction and powers conferred by the royal grant. (p. 38, *ante*.) But beyond the boundaries of these privileged places, neither the king nor any of his grantees claimed a property in the game; for, according to the law of King Canute, *quilibet homo dignus venatione sua, in sylva, et in agris sibi propriis, et in dominio suo*; which law Manwood declares was confirmed by many succeeding kings. (*Tit. For.* pl. 3.) By the *carta de foresta* all the new-made forests were disafforested and thrown open again; but besides the creation of new forests by the Norman kings, they had also made great additions and encroachments to the ancient Saxon forests: these encroachments were called *purlieus*, and as these were the same grievance to the owners of the land as the new forests, they also were disafforested, but with this distinction, that, as the grievance extended only to the land-owner, he was allowed to enjoy his lands in as full a manner as he had done before the encroachment; but they still continued, with respect to the rest of the world, under the forest-law jurisdiction. Hence it followed as a consequence, that the owner of a purlieu might hunt and kill game within the limits of the purlieu, as any other man might have done in his own grounds: and the authorities of Lord Coke and Manwood concur, if deer come out of the forest into the purlieu, the purlieu-man may hunt and kill them, provided he does it fairly and without *forestalling*. And this distinction is made: if a stag can recover the *filum forestæ*, the border of the forest, before the purlieu-man's dogs fasten upon him, he then belongs to the king or to the owner of the forest, and the purlieu-man must call his dogs back; but if they fasten upon

him before he gains the forest, and he drags them into it, he belongs to the owner of the purlieu, who may enter the forest and carry him away. (4 Inst. 303; Manw. *Purlieu*.) This alone is decisive, but there are various authorities to the same effect. In the year-book, 12 Hen. VIII. fo. 10, it is held, if a man drive a stag out of a forest and kill him, he shall gain no property in him, because he shall derive no advantage from his own wrongful act; yet if the stag comes of himself beyond the limits of the forest, then any one (if qualified) may kill and take him, for they are animals *feræ naturæ, et nullius in bonis*; and the maxim is *capiat qui capere potest, i. e. catch that catch can*.

“ That the king has no property in deer or other game, when they are out of a forest, was determined also in a case reported by Keilway, 30, and copied by Manwood, 202. In that case an action of trespass was brought for entering the plaintiff's close; the defendant pleaded, that the place in which the trespass was supposed to be committed was adjoining to the king's forest, and that the plaintiff was bound to impale the said forest, and that, for want of paling, four deer escaped out of the forest into the plaintiff's land, and that he the defendant entered by the command of the forester to drive them back to the forest. The court held that this plea was not good; ‘ for though the plaintiff was in fault ‘ for not paling, yet it was not lawful ‘ for the forester or any person to ‘ drive the deer out of the ground, or ‘ to take them; and the reason was, ‘ because the king had no property in ‘ them; and this was different from ‘ the case of tame cattle, where the ‘ property still remains in the owner ‘ though they are out of his ground, ‘ for which reason he may retake them

has been said) only a qualified property in these animals; it not being absolute or permanent, but lasting only so long as the creatures remain within the limits of such respective franchise or liberty, and ceasing the instant they voluntarily pass out of it. It is held, indeed, that, if a man starts any game within his own grounds, and follows it into another's, and kills it there, the property remains in himself (c). And this is grounded on reason and natural justice (d): for the property consists in the possession; which possession commences by the finding it in his own liberty, and is continued by the immediate pursuit. And so, if a stranger starts game in one man's chase or free-warren, and hunts it into another liberty, the property continues in the owner of the chase or warren; this property arising from privilege (e), and not being changed by the act of a mere stranger. Or if a man starts game on another's private grounds, and kills it there, the property belongs to him in whose ground it was

(c) 11 Mod. 75.

(d) Puff. L. N. 1. 4, c. 6.

(e) Lord Raym. 251.

' wherever he finds them; but it is
' not so when the beasts are wild.'

"The learned judge frequently intimates that no person is exempt from the original penalties; but I am inclined to think that no authority whatever can be found that any penalties were ever inflicted for killing game out of privileged grounds, except those which have been introduced by modern game-laws, or the qualification acts. Lord Coke reports, that the court held, in the case of monopolies, (11 Co. 87,) that 'it is true
' that none can make a park, chase,
' or warren, without the king's license, for that is *quodam modo* to
' appropriate those creatures which
' are *feræ naturæ et nullius in bonis*,
' to himself, and to restrain them of
' their natural liberty, which he cannot do without the king's license;
' but for hunting, hawking, &c., which
' are matters of pastime, pleasure,
' and recreation, there needs no license, but every one may, in his own
' land, use them at his pleasure,

' without any restraint to be made,
' unless by Parliament, as appears by
' the statutes of 11 Hen. VII. c. 17,
' 23 Eliz. c. 10, and 3 Jac. I. c. 13.'

"These authorities are also recognised and confirmed in Bro. Abr. tit. *Propertie*, and in Hale's Commentary to F. N. B. 197.

"The following may serve as a specimen of the authorities collected by Brooke: *quant bestes savages le roye aler hors del forrest, le property est hors del roy*; and again, *silz sount hors del parke capienti conceditur*."

[Whether the facts stated by Mr. Christian be historically correct or not, the principle for which he contends has been virtually recognised by the legislature in the statute of 1 & 2 Gul. IV. c. 32. No landed qualification is now indispensibly necessary to authorise a man to kill game, though he must not, for that or any other purpose, enter upon lands without the consent of the occupier. —ED.]

killed, because it was also started there (*f*); this property arising *ratione soli*. Whereas, if, after being started there, it is killed in the grounds of a third person, the property belongs not to the owner of the first ground, because the property is local; nor yet to the owner of the second, because it was not started in his soil; but it vests in the person who started and killed it (*g*), though guilty of a trespass against both the owners (19).

*III. I proceed now to a third method whereby a title to goods and chattels may be acquired and lost, *viz.* by *forfeiture*; as a punishment for some crime or misdemeanour in the party forfeiting, and as a compensation for the offence and injury committed against him to whom they are forfeited. Of forfeitures, considered as the means whereby *real* property might be lost and acquired, we treated in a former chapter (*h*). It remains, therefore, in this place only to mention by what means, or for what offences, goods and chattels become liable to forfeiture.

III. By forfeiture.

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In the variety of penal laws with which the subject is at present encumbered, it were a tedious and impracticable task to reckon up the various forfeitures inflicted by special statutes, for particular crimes and misdemeanours: some of which are *mala in se*, or offences against the divine law, either natural or revealed; but by far the greatest part are *mala prohibita*, or such as derive their guilt merely from their prohibition by the laws of the land: such as is the forfeiture of 40*s.* per month by the statute 5 Eliz. c. 4, for exercising a trade without having served seven years as an apprentice thereto; and the forfeiture of 10*l.* by 9 Ann. c. 23, for printing an almanack without a stamp. I shall, therefore, confine myself to those offences only, by which *all* the goods and chattels of the offender are forfeited: referring the student for such, where pecuniary mulcts of different

Of penalties by statute.

(*f*) Lord Raym. 251. (*g*) Farr. 18; Lord Raym. 251. (*h*) See page 267.

(19) Mr. Christian observes, that "these distinctions never could have existed, if the doctrine had been true, that all the game was the property of the king; for in that case the maxim, *In æquali jure potior est conditio possidentis*, must have prevailed.

"These distinctions," Mr. Chris-

tian says, "I have heard recognized by Lord Kenyon, who, in an action of trover, directed a verdict for the plaintiff: the defendant having carried away a hare, killed by the plaintiff's greyhounds upon the defendant's ground, but which had not been started there."

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Of the crimes
which induce a
total forfeiture
of goods and
chattels.

quantities are inflicted, to their several proper heads, under which very many of them have been or will be mentioned ; or else to the collections of Hawkins, and Burn, and other laborious compilers. Indeed, as most of these forfeitures belong to the crown, they may seem as if they ought to have been referred to the preceding method of acquiring personal property, namely, by prerogative. But, as, in the instance of partial forfeitures, a moiety often goes to the informer, the poor, or sometimes to other persons ; and as one total forfeiture, namely, that by a bankrupt who is guilty of felony by *concealing his effects, accrues entirely to his creditors, I have therefore made it a distinct head of transferring property.

Goods and chattels then are totally forfeited by conviction of *high treason* or *misprision* of treason ; of *petit treason* ; of *felony* in general, and particularly of *felony de se*, and of *manslaughter* ; nay even by conviction of *excusable homicide* (i) ; by *outlawry* for treason or felony ; by conviction of *petit larceny* ; by *flight* in treason or felony, even though the party be acquitted of the fact ; by *standing mute*, when arraigned of *felony* ; by *drawing a weapon on a judge*, or *striking any one in the presence of the king's courts* ; by *præmunire* ; by *pretended prophecies*, upon a second conviction ; by *owling* ; by the *residing abroad* of artificers ; and by *challenging to fight* on account of money won at gaming. All these offences, as will more fully appear in the fourth book of these Commentaries, induce a total forfeiture of goods and chattels.

The forfeiture
to commence
from the time of
conviction.

And this forfeiture commences from the time of *conviction*, not the time of committing the fact, as in forfeitures of real property (20). For chattels are of so vague and fluctuating a nature, that to affect them by any relation back, would be attended with more inconvenience than in the case of landed estates : and part, if not the whole of them, must be expended in maintaining the delinquent, between the time of committing the fact and his conviction. Yet a fraudulent conveyance of them, to defeat the interest of the crown, is made void by statute 13 Eliz. c. 5.

(i) Co. Litt. 391 ; 2 Inst. 316 ; 3 Inst. 320.

(20) See *ante*, the note to p. 72, and the note to Vol. I. p. 299.

CHAPTER XXVIII.

OF TITLE BY CUSTOM.

A FOURTH method of acquiring property in things personal, IV. By custom. or chattels, is by *custom* (1): whereby a right vests in some particular persons, either by the local usage of some particular place, or by the almost general and universal usage of the kingdom. It were endless, should I attempt to enumerate all the several kinds of special customs which may entitle a man to a chattel interest in different parts of the kingdom: I shall therefore content myself with making some observations on three sorts of customary interests, which obtain pretty generally throughout most parts of the nation, and are therefore of more universal concern; *viz.* *heriots*, *mortuaries*, and *heir-looms*.

1. Heriots, which were slightly touched upon in a former chapter (a), are usually divided into two sorts: heriot-service, and heriot-custom. The former are such as are due upon a special reservation in a grant or lease of lands, and therefore amount to little more than a mere rent (b): the latter arise upon no special reservation whatsoever, but depend merely upon immemorial usage and custom (c). Of these therefore we are here principally to speak: and they are defined to be a customary tribute of goods and chattels, payable to the lord of the fee on the decease of the owner of the land.

1. Heriots, which are of two sorts—heriot-service, and heriot-custom.

*The first establishment, if not introduction, of compul-

[* 423]

Heriots were

(a) Pag. 97.

(b) 2 Saund. 166.

(c) Co. Cop. s. 24.

(1) As to the legal distinction between "custom" and "prescription,"

see *ante*, p. 263, and the note thereto.

first established
by the Danes.

sory heriots into England, was by the Danes: and we find in the laws of king Canute (*d*) the several *heregeates* or heriots specified, which were then exacted by the king on the death of divers of his subjects, according to their respective dignities; from the highest *eorle* down to the most inferior *thegne* or landholder. These, for the most part, consisted in arms, horses, and habiliments of war; which the word itself, according to Sir Henry Spelman (*e*), signifies. These were delivered up to the sovereign on the death of the vassal, who could no longer use them, to be put into other hands for the service and defence of the country. And upon the plan of this Danish establishment did William the conqueror fashion his law of reliefs, as was formerly observed (*f*); when he ascertained the precise relief to be taken of every tenant in chivalry, and, contrary to the feudal custom and the usage of his own duchy of Normandy, required arms and implements of war to be paid instead of money (*g*).

Reliefs.

The Danish compulsive heriots being thus transmuted into reliefs, underwent the same several vicissitudes as the feudal tenures, and in socage estates do frequently remain to this day in the shape of a double rent, payable at the death of the tenant: the heriots which now continue among us, and preserve that name, seeming rather to be of Saxon parentage, and at first to have been merely discretionary (*h*). These are now, for the most part, confined to copyhold tenures, and are due by custom only, which is the life of all estates by copy (2); and perhaps are the only instance where custom has favoured the lord. For this payment was originally a voluntary donation, or gratuitous legacy of the tenant (3); perhaps, in acknowledgment of

(*d*) C. 69.

(*e*) Of Feuds, c. 18.

(*f*) Pag. 65.

(*g*) LL. Guil. Conq. c. 22, 23, 24.

(*h*) Lambard. Peramb. of Kent, 492.

(2) See *ante*, pp. 95—98, with the notes thereto; and also p. 150.

(3) The accuracy of the passage in the text was distrusted in *Garland v. Jekyll*, (2 Bingh. 292, *S. C.* 9 Moore, 545 :) the Chief Justice of the court of Common Pleas said, copyhold tenures appear to have grown out of a state of pure villenage,—(this is also Black-

stone's conclusion; see the pages referred to in the last note,)—and there is no doubt, that, in the early periods of our history, the whole personal property of the villein belonged to the lord: it is said, indeed, in Bracton and in Fleta, that heriots are *ex gratia*: but it is difficult to conceive how the doctrine of *ex gratia* could be applied to times

his having been raised a degree above villenage, when all his goods and chattels were quite at the mercy of the lord;

of villenage; the villein could give nothing which the lord might not at any time take. It is probable—though this is mere conjecture, for the history of heriots is so obscure, that it is impossible to ascertain how they originated,—it is probable that heriots were originally nothing more than the gift which, in a rude state of society, a person in an inferior situation, on approaching one of a superior station, always offered. It has occurred to us, that heriots were a species of tribute, which the tenant offered to the lord at the time he approached him, in order to secure his protection, and to pray of the lord to confer on him the interest which had been determined by the decease of his former tenant. But, whatever the situation of copyholders might have been in the early part of our history, custom has now confirmed their interests as tenants, and this same custom has confirmed and established the rights of the lord. This alteration has been brought about by no statute. It is to lawyers in Westminster-Hall, that slaves, for such was the state of men in pure villenage, (see *ante*, p. 93,) are indebted for the permanency of their property; it is by the establishment of the customs referable to copyholds in courts of justice, that this permanent interest has placed copyholders in the happy situation in which they are now found;—the copyholder, now, has a permanent interest in his estate as long as he performs his services, and the lord has certain rights and dues. The heriot was a species of tribute which the heir paid on the death of his ancestor; it was the heir alone who rendered it; he gave but one tribute, one beast, which would probably be his best beast. It may be asked, if the property was separated into different tenements,

was the lord to wait till the death of *all* the tenants for *one* heriot? No. Of necessity, the instant the estate became separate, there were separate heirs, and *each* heir paid his tribute: this service being incapable of severance, was necessarily multiplied while the estate was held in severalty, or the lord would have lost his right; but the moment a re-union of the whole estate took place, the necessity ceased, and the lord was placed in the same situation as when the grant of the estate was first made, that is, he was only entitled to one heriot. A rule as to copyholds, (confirmed by Mr. Justice Blackstone, and every one who has written upon the subject,) is this, that the claims of the lord are not to be carried to such an extent as would work the disherison of the copyholder; but if a multiplication of heriot-services and fees was to take place, it would, in many cases, work a disherison of the estate; it would make the estate what the civilians call *damnosa hæreditas*. Now, is that fit? We know that formerly copyholds were held with fines uncertain; but the courts have said, “you shall not take what you please, you shall only be entitled to two years’ purchase,” because, if you take just as much as will satisfy your cupidity, you may compel the heir to surrender the estate into your hands; therefore, we will impose our restraint upon you.” Upon the same principle, we must restrain the claim of heriots; at all events, so that these, and the fines and fees, may not exceed the value of the property. We are called on to say, whether, without any *custom* within the manor alleged either way, it is the necessary *legal* consequence, that when an estate has been divided and again re-united, all the heriots are to be paid after the re-

and custom, which has on the *one hand confirmed the tenant's interest in exclusion of the lord's will, has on the other hand established this discretionary piece of gratitude into a permanent duty. An heriot may also appertain to free land, that is held by service and suit of court; in which case it is most commonly a copyhold enfranchised, whereupon the heriot is still due by custom. Bracton (i) speaks of heriots as frequently due on the death of both species of tenants: "*est quidem alia præstatio quæ nominatur herietum; ubi tenens, liber vel servus, in morte sua dominum suum, de quo tenuerit, respicit de meliori averio suo, vel de secundo meliori, secundum diversam locorum consue-*

(i) L. 2, c. 36, s. 9.

union of the several estates, that were paid whilst it was divided: we say there is no such law, no such doctrine.

In the case of *Holloway v. Berkeley*, (6 Barn. & Cress. 9; 9 D. & R. 90, S. C.) the question as to the multiplication of heriots was brought before the court of King's Bench: and it was decided, that when a copyhold tenement, holden by heriot-custom, becomes the property of several *as tenants in common*, the lord is entitled to a heriot from each of them; but if the several portions are re-united in one person, one heriot only is payable. The Court said, the question, in substance, is, whether, upon a tenancy in common, each share of the tenement constitutes *a distinct tenement*; or whether, notwithstanding the distinct *estates* of each tenant in common, the copyhold does not still remain an entire tenement. In the case of heriot-service, or heriot-custom, the law multiplies the heriot in two cases; one, where the tenement is actually divided, and converted into two or more *separate tenements*; the other, where the tenement is left entire, but different persons have distinct undivided estates therein. But will the creation of a tenancy

in common have the effect of producing, even for a time, separate tenements? None of the tenants in common knows his own share in severalty. The creation of a tenancy in common in freeholds leaves the tenement entire; and *à fortiori*, it must do so in copyholds. There is a plain distinction between the alienation of an entire part, and the creation of a tenancy in common: the authorities show, that the former will split one tenement into several, the latter will not. Whatever may at any time have been the number of tenants in common of what was originally one copyhold tenement, when all the interests are again vested in one person, he may consider himself as seised, not of so many undivided portions of the land, but, as the sole proprietor of one entire estate and tenement.

The court added, *Garland v. Jekyll* was a case of the creation of a tenancy in common, and upon the principle that the creation of a tenancy in common leaves the tenement entire, we think that decision right.

A bill for the abolition of heriots, but not disregarding the rights of lords of manors to whom such service is by the present law due, is now (1836) before the House of Commons.

“*tudinem.*” And this, he adds, “*magis fit de gratia quam de jure;*” in which Fleta (*k*) and Britton (*l*) agree: thereby plainly intimating the original of this custom to have been merely voluntary, as a legacy from the tenant; though now the immemorial usage has established it as of right in the lord.

This heriot is sometimes the best live beast, or *averium*, which the tenant dies possessed of (which is particularly denominated the villein’s relief, in the twenty-ninth law of king William the conqueror,) sometimes the best inanimate good, under which a jewel or piece of plate may be included: but it is always a *personal* chattel, which, immediately on the death of the tenant, who was the owner of it, being ascertained by the option of the lord (*m*), becomes vested in him as his property (4); and is no charge upon the lands, but merely on the goods and chattels. The tenant must be the owner of it, else it cannot be due; and, therefore on the death of a feme-covert no heriot can be taken: for she can have no ownership in things personal (*n*). In some places, there is a customary composition in money, as ten or twenty shillings in lieu of a heriot, by which the lord and tenant are both bound, if it be an indisputably ancient custom; but a new composition of this sort will not bind the representatives of either party; for that amounts to the creation of a new custom, which is now impossible (*o*).

Of the nature of the heriot.

*2. Mortuaries are a sort of ecclesiastical heriots, being a customary gift claimed by and due to the minister in very many parishes on the death of his parishioners. They seem originally to have been, like lay heriots, only a voluntary bequest to the church; being intended, as Lyndewode informs us, from a constitution of Archbishop Langham, as a kind of expiation and amends to the clergy for the personal tithes, and other ecclesiastical duties, which the laity in their lifetime might have neglected or forgotten to pay. For this purpose, *after* (*p*) the lord’s heriot, or best good

2. Mortuaries.

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(*k*) L. 3, c. 18.

(*n*) Keilw. 84; 4 Leon. 239.

(*l*) C. 69.

(*o*) Co. Cop. s. 31.

(*m*) Hob. 60.

(*p*) Co. Litt. 185.

(4) And he may seize it, without the formal process of a suit or action. See *ante*, p. 15.

was taken out, the second best chattel was reserved to the church as a mortuary: "*si decedens plura habuerit animalia, optimo cui de jure fuerit debitum reservato, ecclesiæ suæ sine dolo, fraude, seu contradictione qualibet, pro recompensatione subtractionis decimarum personalium, nec non et oblationum, secundum melius animal reservetur, post obitum, pro salute animæ suæ*" (q). And, therefore, in the laws of king Canute (r) this mortuary is called soul-scot (ȝaplyrceat) or *symbolum animæ*. And, in pursuance of the same principle, by the laws of Venice, where no personal tithes have been paid during the life of the party, they are paid at his death out of his merchandise, jewels, and other moveables (s). So, also, by a similar policy, in France, every man that died without bequeathing a part of his estate to the church, which was called *dying without confession*, was formerly deprived of christian burial: or, if he died intestate, the relations of the deceased, jointly with the bishop, named proper arbitrators to determine what he ought to have given to the church, in case he had made a will. But the parliament, in 1409, redressed this grievance (t).

Progress of the doctrine of mortuaries.

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It was anciently usual in this kingdom to bring the mortuary to church along with the corpse when it came to be buried: and thence (u) it is sometimes called a *corse-present*; a *term which bespeaks it to have been once a voluntary donation. However, in Bracton's time, so early as Henry III. we find it riveted into an established custom: insomuch that the bequests of heriots and mortuaries were held to be necessary ingredients in every testament of chattels. "*Imprimis autem debet quilibet, qui testamentum fecerit, dominum suum de meliori re quam habuerit recognoscere; et postea ecclesiam de alia meliori:*" the lord must have the best good left him as an heriot; and the church the second best as a mortuary. But yet this custom was different in different places: "*in quibusdam locis habet ecclesia melius animal de consuetudine; in quibusdam secundum, vel tertium melius; et in quibusdam nihil: et ideo consideranda est consuetudo loci*" (w). This custom still

(q) Provinc. l. 1, tit. 3.

(r) C. 13.

(s) Panormitan. ad decretal. l. 3, t. 20, c. 32.

(t) Sp. L. b. 28, c. 41.

(u) Selden, Hist. of Tithes, c. 10.

(w) Bracton, l. 2, c. 26; Flet. l. 2, c. 57.

varies in different places, not only as to the mortuary to be paid, but the person to whom it is payable. In Wales, a mortuary, or corse-present, was due upon the death of every clergyman, to the bishop of the diocese; till abolished, upon a recompense given to the bishop, by the statute 12 Ann. st. 2, c. 6. And in the archdeaconry of Chester, a custom also prevailed, that the bishop, who is also archdeacon, should have, at the death of every clergyman dying therein, his best horse or mare, bridle, saddle, and spurs, his best gown or cloak, hat, upper garment under his gown, and tippet, and also his best signet or ring (*x*). But by statute 28 Geo. II. c. 6, this mortuary is directed to cease, and the act has settled upon the bishop an equivalent in its room. The king's claim to many goods, on the death of all prelates in England, seems to be of the same nature; though Sir Edward Coke (*y*) apprehends, that this is *a duty due upon death* and not a *mortuary*; a distinction which seems to be without a difference (5). For not only the king's ecclesiastical character, as supreme ordinary, but also the species of the goods claimed, which bear so near a resemblance to those in the archdeaconry of Chester, which was an acknowledged mortuary, puts the matter out of dispute. The king, according to the record vouched by Sir Edward Coke, is entitled to six things: the *bishop's best horse or palfrey, [* 427] with his furniture; his cloak, or gown, and tippet; his cup and cover; his bason and ewer; his gold ring; and lastly, his *muta canum*, his mew or kennel of hounds; as was mentioned in the preceding chapter (*z*).

This variety of customs, with regard to mortuaries, giving frequently a handle to exactions on the one side, and frauds or expensive litigations on the other; it was thought proper, by statute 21 Hen. VIII. c. 6, to reduce them to some kind of certainty. For this purpose, it is enacted, that all mortuaries, or corse-presents to parsons of any parish,

Present state of the law of mortuaries.

(*x*) Cro. Car. 237.

(*y*) 2 Inst. 491.

(*z*) Pag. 413.

(5) See however 8 Bingham. 497, where the Court of Common Pleas seem to have admitted that there was a substantial difference between what Lord Coke really said, and Black-

stone's statement. And, probably, most persons will be of the same opinion, who read the whole passage in the 2nd Instit. and not merely Blackstone's garbled quotation.

shall be taken in the following manner; unless where by custom less or none at all is due: *viz.* for every person who does not leave goods to the value of ten marks, nothing; for every person who leaves goods to the value of ten marks, and under thirty pounds, 3s. 4d.; if above thirty pounds, and under forty pounds, 6s. 8d.; if above forty pounds, of what value soever they may be, 10s., and no more. And no mortuary shall, throughout the kingdom, be paid for the death of any feme-covert; nor for any child; nor for any one of full age that is not a housekeeper; nor for any wayfaring man; but such wayfaring man's mortuary shall be paid in the parish to which he belongs. And upon this statute stands the law of mortuaries to this day.

3. Heir-looms.

3. Heir-looms (6) are such goods and personal chattels,

(6) A court of equity will never fetter personal property, by adjudging it to be held under a will, as an heir-loom, upon presumption; more especially in the case of a testator who, when such was his intention, knew how to express it. A claim which, in effect, attempts to restrain alienation, and permanently to give to personalty the character of annexation to realty, can only be enforced on clear proof; not by doubts on the construction of a will. (*Saville v. Lord Scarborough*, 1 Swanst. 546; *Boon v. Cornforth*, 2 Ves. sen. 280; *Wythe v. Blackman*, 1 Ves. sen. 202.) Still, where a testator has directed that certain personal chattels shall go as heir-looms; though the limitation may not have been made in such terms as the law, in a strict sense, requires for settling heir-looms, Lord Hardwicke seems to have held, that a court of equity should be disposed to give effect to the clear intent, as far as it can be made consistent with the rules of law: (*Gower v. Grosvenor*, Barnard. 56, 63; *S. C.* 5 Mad. 388, 349; *Trafford v. Trafford*, 3 Atk. 349:) and Lord Eldon is reported to have said, that heir-looms are a kind of property which, like all *specific* bequests, are rather favourites

of the Court of Chancery. (*Clarke v. The Earl of Ormonde*, Jacob's Rep. 115.) However this may be, it is settled, that the absolute interest in chattels so given, vests in the first tenant in tail who comes *in esse*. (*Carr v. Lord Errol*, 14 Ves. 487; and see *ante*, p. 175, and the note thereto subjoined.) And Lord Hardwicke himself admitted, that, in the case of *Gower v. Grosvenor*, he went to the utmost allowable extent of construction, in favour of heir-looms. (*Duke of Bridgwater v. Egerton*, 2 Ves. sen. 122.) But, where a personal chattel has been well limited as an heir-loom, a bill in equity will hold for a specific delivery thereof to the party entitled to the possession. (*Earl of Macclesfield v. Davis*, 3 Ves. & Bea. 18.) And clearly, where a testator gives specific articles, intending them to descend as heir-looms, it is the duty of his executors to see that such intention takes effect, as far as lies in their power. Creditors may, indeed, by adopting compulsory measures, drive the executors off that ground; for, no testator can, in any way, exempt any part of his property from payment of his debts; but, executors are bound to preserve, as far

as, contrary to the nature of chattels, shall go by special custom to the heir along with the inheritance, and not to the executor of the last proprietor. The termination, *loom*, is of Saxon original; in which language it signifies a limb or member (*a*); so that an heir-loom is nothing else but a limb or member of the inheritance. They are generally such things as cannot be taken away without damaging or dismembering the freehold: otherwise the general rule is, that no chattel interest whatsoever shall go to the heir, notwithstanding it be expressly limited to a man and his heirs, but shall vest in the executor (*b*) (7). But deer in a real au*thorised park, fishes in a pond, doves in a dove-house, &c., [* 428] though in themselves personal chattels, yet they are so annexed to, and so necessary to the well-being of, the inheritance, that they shall accompany the land wherever it vests, by either descent or purchase (*c*). For this reason also I apprehend it is, that the ancient jewels of the crown are held to be heir-looms (*d*); for they are necessary to maintain the state, and support the dignity, of the sovereign for the time being. Charters, likewise, and deeds, court-rolls, and other evidences of the land, together with the chests in which they are contained, shall pass together with the land to the heir, in the nature of heir-looms, and shall not go to

(*a*) Spelm. Gloss. 277.

(*b*) Co. Litt. 388.

(*c*) Ibid. 8.

(*d*) Ibid. 18.

as the law will permit them, all articles which their testator intended to have treated as heir-looms. (*Clarke v. The Earl of Ormonde*, Jacob's Rep. 112, 114.)

It seems that the journals of the House of Lords, which are delivered gratuitously to each peer, are heir-looms descending with the title, and cannot be retained by a deceased peer's personal representatives. (*Upton v. Lord Ferrars*, 5 Ves. 806.)

(7) Mr. Christian observes, that "if any chattel be given to a man and the heirs of his body, he takes the entire and absolute interest in it. There have been many fruitless at-

tempts to make pictures, plate, books, and household furniture, descend to the heir with a family mansion. Where they are left to be enjoyed as heir-looms by the persons who shall respectively be in possession of a certain house, or to descend as heir-looms as far as courts of law and equity will admit, the absolute interest of them, subject to the life-interests of those who have life-estates in the real property, will vest in that person who is entitled to the first estate-tail or estate of inheritance, and upon his death that interest will pass to his personal representative. (1 Bro. 274; 3 Bro. 101.)"

the executor (*e*). By special custom, also, in some places, carriages, utensils, and other household implements, may be heir-looms (*f*); but such custom must be strictly proved. On the other hand, by almost general custom, whatever is strongly affixed to the freehold or inheritance, and cannot be severed from thence without violence or damage, "*quod ab ædibus non facile revellitur*" (*g*), is become a member of the inheritance, and shall thereupon pass to the heir; as chimney-pieces, pumps, old fixed or dormant tables, benches, and the like (*h*) (8). A very similar notion to which prevails in the duchy of Brabant; where they rank certain things moveable among those of the immoveable kind, calling them by a very particular appellation, *prædia volantia*, or volatile estates: such as beds, tables, and other heavy implements of furniture, which (as an author of their own observes) "*dignitatem istam nacta sunt, ut villis, sylvis, et ædibus, aliisque prædiis, comparentur; quod solidiora mobilia ipsis ædibus ex destinatione patrisfamilias co-hærere videantur, et pro parte ipsarum ædium æstimentur*" (*i*).

Monuments or
tomb-stones.

[* 429]

Other personal chattels there are, which also descend to the heir in the nature of heir-looms, as a monument or tomb-stone (9) in a church, or the coat-armor of his ancestor there *hung up, with the pennons and other ensigns of honour, suited to his degree. In this case, albeit the freehold of the church is in the parson, and these are annexed to that freehold, yet cannot the parson or any other take them away or deface them, but is liable to an action from the heir (*k*). Pews in the church are somewhat of the same nature, which may descend by custom immemorial (without any ecclesiastical concurrence) from the ancestor to the heir (*l*) (10). But

(*e*) Bro. Abr. tit. *Chatteles*, 18.

(*f*) Co. Litt. 18, 185.

(*g*) Spelm. Gloss. 277.

(*h*) 12 Mod. 520.

(*i*) Stockmans De Jure Devolutio-
nis, c. 3, s. 16.

(*k*) 12 Rep. 105; Co. Litt. 18.

(*l*) 3 Inst. 202; 12 Rep. 105.

(8) See p. 281.—CH.

(9) The doctrine laid down in the text was confirmed in *Spooner v. Brewster*, (3 Bingh. 138; 10 Moore, 494,) where it was held, that *trespass* was the proper form of action for the

heir to adopt, if his ancestor's tomb-stone was removed or defaced.

(10) The right to sit in a particular pew in a church may arise, either from prescription as a right appurtenant to an ancient messuage, or from

though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or

a faculty or grant from the ordinary, who has the disposal of all pews to which there is not a title by prescription. The distribution of seats not so appropriated rests with the churchwardens, as the officers, and subject to the control of the ordinary. Neither the minister nor the vestry, unless by virtue of particular local acts, have any right to interfere with the churchwardens, as to seating and arranging the parishioners; though the advice of the minister, and even sometimes the opinions and wishes of the vestry, may be fitly invoked by the churchwardens. The general duty of the churchwardens is to look to the general accommodation of the parish, consulting, as far as may be, that of *all* its inhabitants. But the actual exercise of the churchwarden's office, in this particular, is too frequently interfered with by *faculties*, appropriating certain pews; and by *prescriptive rights* to pews, which rights most probably originated in faculties now lost. In the latter case, the parties claiming must show the annexation of the pews to ancient messuages, time out of mind; and also (if the contest is not with a mere intruder, see *infra*) the reparation of the particular pews by the tenants of such messuages. (*Fuller v. Lane*, 2 Addams, 425; *Woollocombe v. Ouldrige*, 3 Addams, 6; *Pettman v. Bridger*, 1 Phillim. 323; *Clifford v. Wicks*, 1 Barn. & Ald. 507.)

In *Davis v. Witts*, (Forrest. 18,) it was held, that a pew in the aisle of a church might be prescribed for as appurtenant to a house out of the parish. And in *Lousley v. Hayward*, (1 Younge & Jerv. 585,) Chief Baron Macdonald held, that such prescription might also lie for a pew in the body of a church: for, very probably, the house, as appurtenant to which

the pew was claimed, though not now within the parish, according to its present boundaries, was formerly within the ecclesiastical limits of the church; and therefore it could not be assumed that the prescription must, of necessity, be bad in law. However, from one passage of the judgment pronounced in *Byerley v. Windus*, (as that case is reported in 5 Barn. & Cress. 18,) Mr. Justice Bayley may be thought to have held, that a non-parishioner could not claim a seat in a church by prescription; but that, if a man does not reside in the parish, his right to use a seat, whatever was the nature and origin of that right, is at an end. That, however, would be inconsistent with other passages in the same judgment, and also with the report of the same case in 7 Dowl. & Ryl. (see pp. 591, 595,) where the learned judge seems to have admitted that such a claim might be good by prescription or immemorial custom: so that this case cannot be cited as in direct opposition to the decisions in *Davis v. Witts*, and in *Lousley v. Hayward*.

For a pew in a church, appurtenant by prescription to an ancient messuage, an action on the case lies; and against an intruder, long possession may be, *prima facie*, a sufficient title. (*Stocks v. Booth*, 1 T. R. 430.) Mr. Justice Willes, indeed, said he would presume any thing in favour of the right of a family which was proved to have sat in a pew between thirty and forty years, without interruption. (*Rogers v. Brooks*, 1 T. R. 432; and see *Griffiths v. Matthews*, 5 T. R. 298, as also statute 2 & 3 Gul. IV. c. 71.) But though there is no doubt an action on the case lies for a seat in a church, as appendant to a house; and as, against a mere intruder, no allegation that the plaintiff has been

ashes ; nor can he bring any civil action against such as indecently at least, if not impiously, violate and disturb their remains, when dead and buried. The parson, indeed, who has the freehold of the soil, may bring an action of trespass against such as dig and disturb it : and, if any one, in taking up a dead body, steals the shroud or other apparel, it will be felony (*m*) ; for the property thereof remains in the executor, or whoever was at the charge of the funeral (11).

Heir-looms cannot be devised away from the heir, by will.

But to return to heir-looms : these, though they be mere chattels, yet cannot be devised away from the heir by will ; but such a devise is void (*n*), even by a tenant in fee-simple. For, though the owner might, during his life, have sold or disposed of them, as he might of the timber of the estate, since, as the inheritance was his own, he might mangle or dismember it as he pleased ; yet, they being at his death instantly vested in the heir, the devise (which is subsequent, and not to take effect till *after* his death) shall be postponed to the custom, whereby they have already descended.

(*m*) 3 Inst. 110 ; 12 Rep. 113 ; 1 Hal. P. C. 515.

(*n*) Co. Litt. 185.

accustomed to repair the same is necessary, as it would be if the controversy were with the ordinary ; (*Bradbury v. Burch*, T. Jones, 3 ; *Kenrick v. Taylor*, 1 Wils. 327 ;) nor need it be *alleged*, that the messuage to which the right is appurtenant is an *ancient* messuage, for the claim of a prescriptive appurtenant right necessarily includes that fact ; (*Dawney v. Dee*, Cro. Jac. 605 ;) still, it is only in cases where a pew is annexed to a messuage by prescription, or where the pew is in a chancel the freehold of an individual, that such a question is triable at common law. (*May v. Gilbert*, 2 Bulstr. 151 ; *Mainwaring v. Giles*, 5 Barn. & Ald. 360.) In *Stocks v. Booth*, (1 T. R. 430,) it was said, *trespass* will not lie for entering a pew ; but this seems at least doubtful, as, against a wrong-doer, there is authority for holding trespass to be the right form of action. (*Duke of Newcastle v. Clark*, 8 Taunt. 515 ; 2 Moore, 666 ; *Dawney v. Dee*, 2

Rolle's Rep. 140 ; S. C. Palm. 48 ; *Spooner v. Brewster*, 10 Moore, 494 ; 3 Bingham. 138.)

(11) Mr. Christian observes, that " it has been determined, that stealing dead bodies, though for the improvement of the science of anatomy, is an indictable offence as a misdemeanor ; it being a practice contrary to common decency, and shocking to the general sentiments and feelings of mankind. (2 T. R. 733.)" [The difficulty of procuring anatomical subjects, however, led to offences much more atrocious ; and the detection of a course of systematical, cold-blooded murders, to supply the demand for dead bodies, caused the act of 2 & 3 Gul. IV. c. 75, to be passed, for regulating schools of anatomy. The statute, (which has been slightly altered by that of 4 & 5 Gul. IV. c. 26,) seems well calculated to insure a supply of subjects for the improvement in science, and to put down the nefarious system above alluded to.—ED.]

CHAPTER XXIX.

OF TITLE BY SUCCESSION, MARRIAGE, AND JUDGMENT.

IN the present chapter we shall take into consideration three other species of title to goods and chattels.

V. The fifth method, therefore, of gaining a property in chattels, either personal or real, is by *succession*: which is, in strictness of law only applicable to corporations aggregate of many, as dean and chapter, mayor and commonalty, master and fellows, and the like; in which one set of men may, by succeeding another set, acquire a property in all the goods, moveables, and other chattels of the corporation. The true reason whereof is, because in judgment of law a corporation never dies: and, therefore, the predecessors, who lived a century ago, and their successors now in being, are one and the same body corporate (*a*). Which identity is a property so inherent in the nature of a body politic, that, even when it is meant to give any thing to be taken in succession by such a body, that succession need not be expressed: but the law will of itself imply it. So that a gift to such a corporation, either of lands or of chattels, without naming their successors, vests an absolute property in them so long as the corporation subsists (*b*). And thus a lease for years, an *obligation, a jewel, a flock of sheep, or other chattel interest, will vest in the successors, by succession, as well as in the identical members, to whom it was originally given.

V. By succession—which is, in strictness, applicable only to aggregate corporations.

But, with regard to sole corporations, a considerable distinction must be made. For, *if such sole corporation be the representative of a number of persons*; as the master of

As to corporations sole.

(*a*) 4 Rep. 65.

(*b*) Bro. Abr. t. *Estates*, 90; Cro. Eliz. 464.

an hospital, who is a corporation for the benefit of the poor brethren; an abbot, or prior, by the old law before the reformation, who represented the whole convent; or the dean of some ancient cathedral, who stands in the place of, and represents in his corporate capacity, the chapter; *such sole corporations as these* have, in this respect, the same powers as corporations aggregate have, to take personal property or chattels in succession. And, therefore, a bond to such a master, abbot, or dean, and his successors, is good in law; and the successor shall have the advantage of it, for the benefit of the aggregate society, of which he is in law the representative (c). Whereas, in the case of *sole corporations, which represent no others but themselves*, as bishops, parsons, and the like, no chattel interest can regularly go in succession (1): and, therefore, if a lease for years be made to the bishop of Oxford and his successors, in such case his executors or administrators, and not his successors shall have it (d). For, the word *successors*, when applied to a person in his political capacity, is equivalent to the word *heirs* in his natural; and as such a lease for years, if made to John and his heirs, would not vest in his heirs but his executors; so if it be made to John bishop of Oxford and his successors, who are the heirs of his body politic, it shall still vest in his executors and not in such his successors. The reason of this is obvious: for, besides that the law looks upon goods and chattels as of too low and perishable a nature to be limited either to heirs, or such successors as are equivalent to heirs; it would also follow, that, if any such chattel interest (granted to a sole corporation and his successors) were allowed to descend to such successor, the property thereof must be in abeyance from

[*432] the *death of the present owner until the successor be appointed: and this is contrary to the nature of a chattel interest, which can never be in abeyance (2) or without an owner (e); but a man's right therein, when once suspended, is gone for ever. This is not the case in corporations aggregate, where the right is never in suspense; nor in the

(c) Dyer, 48; Cro. Eliz. 464.

(d) Co. Litt. 46.

(e) Brownl. 132.

(1) See Vol. I. p. 477.

the note annexed thereto.

(2) See *ante*, p. 107, ch. 7, with

other sole corporations before mentioned, who are rather to be considered as heads of an aggregate body, than subsisting merely in their own right: the chattel interest, therefore, in such a case, is really and substantially vested in the hospital, convent, chapter, or other aggregate body; though the head is the visible person in whose name every act is carried on, and in whom every interest is therefore said (in point of form) to vest. But the general rule, with regard to corporations merely sole, is this, that no chattel can go to or be acquired by them in right of succession (*f*).

Yet, to this rule there are two exceptions. One in the case of the king, in whom a chattel may vest by a grant of it formerly made to a preceding king and his successors (*g*). The other exception is, where, by a *particular* custom, some *particular* corporations sole have acquired a power of taking *particular* chattel interests in succession. And this custom, being against the general tenor of the common law, must be strictly interpreted, and not extended to any other chattel interests than such immemorial usage will strictly warrant. Thus, the chamberlain of London, who is a corporation sole, may, by the custom of London, take *bonds* and *recognizances* to himself and his successors, for the benefit of the orphan's fund (*h*): but it will not follow from thence, that he has a capacity to take a *lease for years* to himself and his successors for the same purpose; for the custom extends not to that: nor that he may take a *bond* to himself and his successors, for any other purpose than the benefit of the orphan's fund; for that also is not warranted by the custom. Wherefore, upon the whole, we may close this head with laying down this general rule; that such right of succession to chattels is *universally inherent by the common law in all aggregate corporations, in the king, and in such single corporations as represent a number of persons; and may, by special custom, belong to certain other sole corporations for some particular purposes: although, generally, in sole corporations no such right can exist.

Exceptions.

[* 433]

VI. A sixth method of acquiring property in goods and chattels is by *marriage*, whereby those chattels, which belonged formerly to the wife, are by act of law vested in the

VI. By marriage.

(*f*) Co. Litt. 46.(*g*) Ibid. 90.(*h*) 4 Rep. 65; Cro. Eliz. 682.

husband, with the same degree of property, and with the same powers, as the wife, when sole, had over them (3).

Chattels personal
vest in the
husband abso-
lutely;

This depends entirely on the notion of an unity of person between the husband and wife, it being held that they are one person in law (*i*), so that the very being and existence of

(*i*) See book I. c. 15, pp. 442, 445.

(3) The interest which a husband has in the personal estate and real chattels which belonged to his wife before marriage, is founded upon that good faith which ought to be inviolably preserved in so solemn a contract as that of marriage. The burthens to which a husband is liable, are a consideration for his marital rights; upon which rights, therefore, a fraud is committed if the consideration is withheld from him. A conveyance by a woman at any time before her marriage, is *prima facie* good; but, if a woman, during the course of a treaty of marriage with her, make, without notice to the intended husband, a conveyance of any part of her property, a court of equity, it has been held, will set aside that conveyance, as affected with fraud. (*Countess of Strathmore v. Bowes*, 1 Ves. jun. 28; *Draper's case*, 2 Freem. 29, 2nd edit.) Some of the *dicta*, however, in the case just cited from Vesey's Rep. seem to intimate, that a conveyance of her own property in trust for herself, by a woman before marriage, though without her intended husband's privity, may, under circumstances, be sustained in equity; and the same doctrine was held in *Slocombe v. Glubb*, (2 Br. 551,) as it had previously been in *Blithe's case*. (2 Freem. 91.) But then, the circumstances must be special; it appears to be a general rule, that after an intimacy with a view to marriage has commenced, a settlement made by the woman, of any part of her property in exclusion of the marital rights of her husband, is fraudulent and void, if concealed from him. The passages

of the judgment in *Strathmore v. Bowes*, from which it might be inferred, that mere concealment would not be sufficient to invalidate such an instrument, where the husband was not positively misled by some express affirmation on the subject;—these passages, it has been judicially declared, must be understood only as having reference to the particular circumstances of the case in which the *dicta* were pronounced. (*Goddard v. Snow*, 1 Russ. 494.) In the later case, however, of *St. George v. Wake*, (1 Mylne & Keen, 620,) the judgment in which case refers to and analyses all the leading previous decisions, it is said that, it has often indeed been laid down as a principle, that a voluntary conveyance by a woman, while her marriage is in contemplation, is avoidable by the husband from whom it was concealed; but, this principle has been very rarely acted upon to the extent of avoiding, by judicial decision, such conveyance, as a fraud upon the husband's rights.

Marriage is an absolute gift to the husband of all the goods, personal chattels and estate, which the wife was actually and beneficially possessed of at that time, and of such other goods and personal chattels as come to her, in her own right, during the marriage. (Co. Litt. 300 a, 351 a & b.) But this interest the husband may waive by contract; (*Hunt v. Pitt*, 2 Freem. 79;) and may empower his wife to make a testamentary disposition of her personal estate during her coverture. (See *ante*, p. 375, note, and *post*, p. 498.)

the woman is suspended during the coverture, or entirely merged or incorporated in that of the husband. And hence it follows, that whatever personal property belonged to the wife, before marriage, is by marriage absolutely vested in the husband. In a real estate, he only gains a title to the rents and profits during coverture: for that, depending upon feodal principles, remains entire to the wife after the death of her husband, or to her heirs, if she dies before him; unless, by the birth of a child, he becomes tenant for life by the curtesy (4). But, in chattel interests, the sole and absolute property vests in the husband, to be disposed of at his pleasure, if he chooses to take possession of them: for, unless he reduces them to possession, by exercising some act of ownership upon them, no property vests in him, but they shall remain to the wife, or to her representatives, after the coverture is determined (5).

chattels real, sub modo only.

(4) See *ante*, p. 126, *et seq.* the third section of chapter 8, with the notes thereto.

(5) Whether it is competent to a married woman, by examination in court, to part with her contingent, or reversionary chattel interest, is a question which has been much agitated. There are cases where the wife's consent has been taken *de bene esse*; (*Woollands v. Crowcher*, 12 Ves. 178; *Richards v. Chambers*, 10 Ves. 581;) but this practice does not appear to be generally approved. (*Sperling v. Rochfort*, 8 Ves. 178, and see *infra*.) It is true, that, in *Saddington v. Kinsman*, (1 Br. 48,) the leaning of Lord Thurlow's opinion was, that a wife's reversionary chattel interests might be assigned by her husband, if he had made a settlement upon her: (see also, *Carteret v. Paschal*, 3 P. Wms. 199,) and if the law were settled that a husband could, for a valuable consideration paid to himself, assign his wife's reversionary chattel interests—(subject only to her equity to have a provision thereout, in cases where the funds cannot be come at without the assistance of a court of equity; *Franco*

v. Franco, 4 Ves. 520; *Like v. Beresford*, 3 Ves. 511;)—it would then be difficult to say why a wife, willing to join in such assignment, might not be permitted to part with her equity, by examination; and in *Howard v. Damiani*, (2 Jac. & Walk. 458 n.) such permission was given. But, in *Ritchie v. Broadbent*, (*Ibid.*) doubt was expressed as to the propriety of the decree in *Howard v. Damiani*; and although this was an *obiter dictum* not necessary to the decision of *Ritchie v. Broadbent*, (in which case, to have permitted the wife to part with her interest, would have been contradictory to the express intention of the donor of that interest, who, by his will, prohibited *anticipation*,) yet, in the later and well considered case of *Purdew v. Jackson*, (1 Russ. 1—71,) it was distinctly held, (and the doctrine was confirmed in the still more recent case of *Honner v. Morton*, 3 Russ. 68,) that where a husband and wife, by deed executed by both, assign to a purchaser for valuable consideration an ascertained fund, in which the wife has a vested interest in remainder expectant on the death of a tenant for

Distinction in
this between
chattels personal

There is, therefore, a very considerable difference in the acquisition of this species of property by the husband, ac-

life of that fund, and both the wife and the tenant for life outlived the husband, the wife was entitled, by right of survivorship, to claim the fund against such particular assignee for valuable consideration. The assignee, it was determined, merely purchased the chance of the husband's outliving the wife; if the reversionary *chose en action* had fallen into possession during the coverture, the assignment might have been available; but the husband's right was no more than a right to obtain possession of the subject, when the period should arrive at which the wife would be entitled to the possession of it: by his death before that time, leaving his wife surviving, the husband's right was gone, and with it the derivative right of the assignee was also gone; and the claim of the surviving wife, it was held, must take effect. For, though a future *chose en action* be assignable in equity, the assignment cannot alter the nature of the thing; the subject must remain what it was before, a *chose en action* not reduced into possession. A court of equity will not refuse to give effect to such an assignment, so far as the assignor had any right or interest to assign; (*Ripley v. Woods*, 2 Sim. 167;) but, the interest of a husband in his wife's reversionary *choses en action*, (and *a fortiori* the interest of the husband's assignee, *Pierce v. Thorneley*, 2 Sim. 179,) must depend upon the chance of his living till the property is actually reduced into possession. (*Stamper v. Barker*, 5 Mad. 157; *White v. St. Barbe*, 1 Ves. & Bea. 405.) And, it seems, a wife ought not to be permitted, in such a case, to divest herself of the chance in her favour; and that a court of equity should not, by taking the wife's consent to pass a remainder or reversion in personal property to

her husband or his assignee, lend itself as an instrument to enable the husband to acquire a right in the wife's chattels, which he could by no means acquire at law; (*Wade v. Saunders*, 1 Turn. & Russ. 307;) by parting with such a remainder or reversion, the wife would not only part with a future possible equity, but with her chance of coming into possession of the whole property by surviving her husband. (*Pickard v. Roberts*, 3 Mad. 386.) Of course, if such reversionary interests are so given or settled to the separate use of the wife, that she has the legal power of disposing thereof, her examination would be idly superfluous; she may pass the property without any such form. (*Sturgis v. Corp*, 13 Ves. 192.)

It seems, from the authorities already stated, to be, at present, clearly held, that a deed by which a husband assigns his wife's contingent or reversionary chattel interests, is not such a reduction thereof into possession by him, as to give even a qualified title to his assignee, if the wife prove to be the survivor. (*Purdew v. Jackson*, 1 Russ. 50; *Hornsby v. Lee*, 2 Mad. 20.) And though, (in *Gage v. Acton*, 1 Salk. 327,) Chief Justice Holt said, that when the wife has *any* right or duty, which by possibility may happen to accrue during the marriage, the husband may, by release, discharge it; this *dictum* cannot now be relied on, without qualifying it by a condition, that the possibility shall actually come into possession during the coverture. Keeping this restriction in mind, there is no doubt that a wife's possibilities are assignable by her husband, for a valuable consideration; though the assignee may be compelled to make some provision for the wife, when the subject of assignment is of such a nature, that when

according to the subject-matter; *viz.* whether it be a chattel *real*, or a chattel *personal*: and, of chattels personal, whe- in possession, and those in action only.

the contingency has happened, it cannot be reached without the aid of equity: (*Johnson v. Johnson*, 1 Jac. & Walk. 477; *Beresford v. Hobson*, 1 Mad. 373; *Lloyd v. Williams*, 1 Mad. 457:) and it seems, that courts of equity do not merely act in analogy to the legal doctrine, but were the first to hold that such assignment by the husband ought to be supported. (*Grey v. Kentish*, 1 Atk. 280; *Hawkyns v. Obyn*, 2 Atk. 551; *Bates v. Dandy*, 2 Atk. 208; *Duke of Chandos v. Talbot*, 2 P. Wms. 608, and cases there cited; *Spragg v. Binks*, 5 Ves. 588.)

It appears settled, however, that, where the wife's interest was such, that the husband could not, even for valuable consideration, have released it at law, equity will not assist him. Thus, if the reversion could not possibly fall into possession during the husband's life;—for instance, if it were a reversion upon his own death, there the husband's release or assignment, would be invalid at law; and clearly the wife's consent would not be taken, in order to give it effect in equity. (*Dalbiac v. Dalbiac*, 16 Ves. 122.) So, if a woman, before marriage, stipulate that her property shall revert to her own absolute disposal in the event of her surviving her husband, or if a bequest be made to her, accompanied with that direction; and no power of disposition over the fund, during the marriage, be reserved by her, in one case, or given to her in the other; there, it would obviously be to defeat the plain object of the settlement, or will, if the wife, whilst under the possible influence of her husband, were permitted, either by examination in court, or by any other act during the coverture, to dispose of her right of survivorship. (*Richards v. Chambers*, 10 Ves. 586; *Lee v. Muggeridge*, 1 Ves. & Bea. 123.)

An assignment, by a husband, to a particular assignee, of a *chose en action*, or equitable interest given to his wife, in terms not making it her separate estate, *for her life only*, (such assignment being made for valuable consideration, and at a time when the husband was maintaining his wife,) will, it seems, not only be supported, but the purchaser will not be bound to make any provision for the wife. (*Elliot v. Cordell*, 5 Mad. 156; *Wright v. Morley*, 11 Ves. 18; *Mitford v. Mitford*, 9 Ves. 100; *Stauton v. Hall*, 2 Russ. & Mylne, 182.) Equity, however, will not allow the general assignee under a commission of bankruptcy against a husband, to obtain possession of such property, without making some provision for the wife; since, when the title of such last-described assignee vests, the incapacity of the husband to maintain his wife has already raised this equity in her favour: (*Elliot v. Cordell*, *ubi supra*;) and where the right to the whole equitable interest, or *chose en action*, was in the wife, absolutely, and not for life only, there the preponderance of modern authority (after considerable fluctuation of judicial opinion) seems fully to establish, that the wife's right to a provision cannot be resisted by the particular assignee of her husband, more than by his general assignee. (*Johnson v. Johnson*, 1 Jac. & Walk. 477; *Like v. Beresford*, 3 Ves. 512; *Macauley v. Phillips*, 4 Ves. 19; *Beresford v. Hobson*, 1 Mad. 373; *Earl of Salisbury v. Newton*, 1 Eden, 371; *Oswell v. Probert*, 2 Ves. jun. 682.)

When a husband makes a settlement in consideration of the wife's whole fortune, whatever fortune she then has, notwithstanding it may consist entirely of *choses en action*, is looked on as purchased by the hus-

ther it be in *possession*, or in *action* only. A *chattel real* vests in the husband, not absolutely, but *sub modo*. As, in case of a lease for years, the husband shall receive all the rents and profits of it, and may, if he pleases, sell, surrender, or dispose of it during the coverture (*k*): if he be outlawed or attainted, it shall be forfeited to the king (*l*); it is liable to execution for his debts (*m*); and, if he survives his wife, it is to all intents and purposes his own (*n*). Yet, if

(*k*) Co. Litt. 46.

(*l*) Plowd. 263.

(*m*) Co. Litt. 351.

(*n*) Ibid. 300.

band, and it will go to his executors, though he may not have reduced it into possession: but, if the settlement was made in consideration of a part only of the wife's fortune, then the remaining part, if not reduced by the husband into possession during his life, will survive to his wife; (*Cleland v. Cleland*, Prec. in Cha. 63;) for, the mere fact of his having made a settlement upon his wife at the time of the marriage, is not sufficient to entitle a husband to his wife's *choses en action*, or chattels; to constitute him a purchaser thereof, so as to exclude the wife's equity, there must be an agreement, either expressed or implied; (*Salwey v. Salwey*, Ambl. 693;) and, according to the modern cases, a settlement made by the husband is no purchase of the wife's equitable interests, or *choses en action*, unless such settlement either distinctly expresses it to be made in consideration of the wife's fortune; or the contents thereof altogether import that, and plainly import it, as much as if it were expressed. (*Druce v. Dennison*, 6 Ves. 395.) It is also well settled that, a settlement in consideration of the wife's fortune will be understood to have been intended to apply only to her fortune at the time; unless the settlement expressly, or by necessary implication, shows that it was the intention to comprehend all future property which might devolve upon the wife. Where no distinct agreement to

that effect appears, should any subsequent accession of *choses en action* accrue to the wife, in such a shape that the husband cannot lay hold of it without the assistance of a court of equity, the wife will, according to the established rule of such courts, be entitled to an additional provision out of that additional fortune, as against either the husband or his assignee; (*Ex parte O'Ferrall*, 1 Glyn & Jameson, 348;) and if the husband die first, not having reduced the property into possession, nor having assigned it for valuable consideration, the whole will survive to the wife. (*Mitford v. Mitford*, 9 Ves. 95, 96; *Carr v. Taylor*, 10 Ves. 579; *Burnett v. Kinaston*, 2 Freem. 241, 2nd edit.; *Wildman v. Wildman*, 9 Ves. 177; *Nash v. Nash*, 2 Mad. 139.) But if the wife's property be of such a nature that the husband, or his assignees, can reach it by process of common law, there is no ground for the interposition of equity to restrain the exercise of the legal right. (*Oswell v. Probert*, 2 Ves. jun. 682; *Attorney General v. Whorwood*, 1 Ves. sen. 539; *Macauley v. Phillips*, 4 Ves. 18; *Langham v. Nenny*, 3 Ves. 469; *Jewson v. Moulson*, 2 Atk. 420; *Purdew v. Jackson*, 1 Russ. 54.)

Stock, standing in the books of the Bank of England in the names of trustees, is a *chose en action*, and in a question of survivorship must be so considered. (*Scawen v. Blunt*, 7 Ves. 300.)

he has made no disposition thereof in his life-time, and dies before his wife, he cannot dispose of it by will (*o*): for, the husband having made no alteration in the property during his life, it never was transferred from the wife; but after his death she shall remain in her ancient possession, and it shall not go to his executors. So it is also of chattels personal (or *choses*) in *action*: as debts upon bond, contracts, and the like: these the husband may have if he pleases; that is, if he reduces them into possession by receiving or recovering them at law. And, upon such receipt or recovery, they are absolutely and entirely his own; and shall go to his executors or administrators, or as he shall bequeath them by will, and shall not revest in the wife. But, if he dies before he has recovered or reduced them into possession, so that, at his death, they still continue *choses in action*, they shall survive to the wife; for the husband never exerted the power he had of obtaining an exclusive property in them (*p*). And so, if an estray comes into the wife's franchise, and the husband seizes it, it is absolutely his property: but, if he dies without seizing it, his executors are not now at liberty to seize it, but the wife or her heirs (*q*); for the husband never exerted the right he had, which right determined with the coverture. Thus, in both these species of property the law is the same, in case the wife survives the husband; but, in case the husband survives the wife, the law is very different with respect to *chattels real* and *choses in action*: for he shall have *the *chattel real* by survivorship, but not the *chose in action* (*r*); except in the case of arrears of rent, due to the wife before her coverture, which, in case of her death, are given to the husband by statute 32 Hen. VIII. c. 37. And the reason for the general law is this: that the husband is in absolute possession of the *chattel real* during the coverture, by a kind of joint-tenancy with his wife; wherefore the law will not wrest it out of his hands, and give it to her representatives; though, in case he had died first, it would have survived to the wife, unless he thought proper in his life-time to alter the possession. But a *chose in action* shall not survive to him, because he never was in possession of it at all, during the coverture; and the

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(*o*) Poph. 5; Co. Litt. 351.(*p*) Co. Litt. 351.(*q*) Ibid.(*r*) 3 Mod. 186.

only method he had to gain possession of it, was by suing in his wife's right(6): but as, after her death, he cannot (as husband) bring an action in her right, because they are no longer one and the same person in law, therefore he can never (as such) recover the possession. But he still will be entitled to be her administrator; and may, in that capacity, recover such things in action as became due to her before or during the coverture (7).

Thus, and upon these reasons, stands the law between husband and wife, with regard to *chattels real* and *choses in action*: but, as to *chattels personal* (or *choses*) *in possession*, which the wife hath in her own right, as ready money, jewels (8), household goods, and the like, the husband hath therein an immediate and absolute property, devolved to him by the marriage, not only potentially, but in fact, which never can again revest in the wife or her representatives (s).

(s) Co. Litt. 351.

(6) If a bond or note be given to a *feme sole*, who afterwards marries, it cannot be put in suit after the coverture by the husband alone: but, where a bond or promissory note is given to a *feme coverte* the interest in such bond or note immediately vests in the husband, so far as to enable him to maintain an action upon it in his own name; though he may join his wife's name as a co-plaintiff in the action. (*Philliskirk v. Pluckwell*, 2 Mau. & Sel. 396; *Holloway v. Lightbourne*, 2 Mad. 136, n.; *Howell v. Maine*, 3 Lev. 403.)

For a legacy given to his wife, the husband cannot bring his bill, without making the wife a party, in order that her equity to have a provision secured to her thereout may be attended to. (*Clarke v. Lord Angier*, 2 Freem. 160.)

If husband and wife exhibit a bill in right of the wife, and the husband dies, the wife may proceed without filing a bill of revivor: (*Anonym.* 3 Atk. 726; *Pary v. Juxon*, 3 Cha. Rep.

40; *Backhouse v. Middleton*, 2 Freem. 132, 2d edit.): but, the wife is not bound to proceed in the cause, and if she does not choose to do so, she is not liable to costs previously incurred: though, if she takes any step in the suit after her husband's death, she makes herself liable to the costs from the beginning. (Mitf. Pl. 47.)

(7) Mr. Christian observes, that "by 29 Car. II. c. 3, s. 25, the husband shall have administration of all his wife's personal estate which he did not reduce into his possession before her death, and shall retain it to his own use: and if he dies before administration is granted to him, or he has recovered his wife's property, the right to it passes to his personal representative, and not to the wife's next of kin. (1 P. Wms. 378; Butl. Co. Litt. 351.)"

(8) The doctrine that jewels can never revest in the wife after her marriage, is qualified in the next paragraph of the text.

And, as the husband may thus generally acquire a property in all the personal substance of the wife, so in one particular instance the wife may acquire a property in some of her husband's goods; which shall remain to her after his death, and not go to his executors. These are called her *paraphernalia*; *which is a term borrowed from the civil law (*t*), and is derived from the Greek language, signifying something over and above her dower. Our law uses it to signify the apparel and ornaments of the wife, suitable to her rank and degree; and therefore even the jewels of a peeress, usually worn by her, have been held to be *paraphernalia* (*u*). These she becomes entitled to at the death of her husband, over and above her jointure or dower, and preferably to all other representatives (*w*). Neither can the husband devise by his will such ornaments and jewels of his wife; though during his life perhaps he hath the power (if unkindly inclined to exert it) to sell them or give them away (*x*). But if she continues in the use of them till his death, she shall afterwards retain them against his executors and administrators, and all other persons except creditors where there is a deficiency of assets (*y*) (9). And

Of the wife's property in her apparel and ornaments.

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(*t*) Ff. 23, 3, 9, s. 3.

(*u*) Moor, 213.

(*w*) Cro. Car. 343; 1 Roll. Abr. 911; 2 Leon. 166.

(*x*) Noy's Max. c. 49; *Grahme v. Lord Londonderry*, 24 Nov. 1746,

Canc. [reported in 3 Atk. 394.]

(*y*) 1 P. Wms. 730.

(9) The right of a widow to *bona paraphernalia* is preferable to that of a legatee; (*Snelson v. Corbet*, 3 Atk. 369; *Seymour v. Tresilian*, 3 Atk. 358;) but gives place to the demands of the creditors of her deceased husband: (*Campion v. Campion*, 17 Ves. 273; *Wilson v. Pack*, Prec. in Cha. 297; *Lady Tyrrell's case*, in Append. to 2nd edit. of 2 Freem. 304:) though even this latter doctrine is qualified, by the decisions which hold that, the claim to paraphernalia is not to be disappointed by the effect of the option of a creditor who has a double fund to resort to: (*Aldrich v. Cooper*, 8 Ves. 397:) if the husband's personal estate, therefore, has been exhausted by specialty creditors, who have swept

away the widow's paraphernalia, she will be allowed, in equity, to stand in their place, so as to come upon the real assets of her husband for the value of her paraphernalia. (*Snelson v. Corbet*, 3 Atk. 369; *Lord Townsend v. Windham*, 2 Ves. sen. 7.) The widow has this equity as against her husband's heir-at-law, to whom his real estates have descended; (*Probert v. Morgan*, 1 Atk. 441;) *à fortiori*, if the husband has created a trust estate for payment of debts, the wife will be admitted as a creditor for the value of her paraphernalia, if these have been seized for her husband's debts. (*Northey v. Northey*, 2 Atk. 78; *Boynton v. Boynton*, 1 Cox, 106; *Tipping v. Tipping*, 1 P. Wms. 729;

her necessary apparel is protected even against the claim of creditors (z).

VII. By judgment.

VII. A judgment, in consequence of some suit or action in a court of justice, is frequently the means of vesting the right and property of chattel interests in the prevailing party. And here we must be careful to distinguish between property, the *right* of which is before vested in the party, and of which only *possession* is recovered by suit or action; and property, to which a man before had no determinate title or certain claim, but he gains as well the right as the possession by the process and judgment of the law. Of the former sort are all debts and *choses in action*; as, if a man gives bond for 20*l.* or agrees to buy a horse at a stated sum, or takes up goods of a tradesman upon an implied contract to pay as much as they are reasonably worth: in all these cases the right accrues to the creditor, and is completely vested in him, at the time of the bond being sealed, or the contract or agreement made; and the law only gives him a remedy to recover the possession of that right, which already in justice belongs to him. *But there is also a species of property to which a man has not any claim or title whatsoever, till after suit commenced and judgment obtained in a court of law: where the right and the remedy do not follow each other, as in common cases, but accrue at one and the same time; and where, before judgment had, no man can say that he has any absolute property, either in possession or in action. Of this nature are,

1. Of penalties by statutes, recoverable in actions *popular*.

1. Such penalties as are given by particular statutes, to be recovered on an action *popular*; or, in other words, to be recovered by him or them that will sue for the same. Such as the penalty of 500*l.* which those persons are by several acts of parliament made liable to forfeit, that, being

(z) Noy's Max. c. 49.

Ridout v. Earl of Plymouth, 2 Atk. 105.) But whether the widow has the same equity as against a devisee (not being a devisee in trust for payment of debts, and the lands devised not being expressly charged therewith,) is not quite so clear. (See Mr. Cox's note to *Tynte v. Tynte*, 2 P.

Wms. 544.)

A wife who, by articles before marriage, is by express words barred of every thing she could otherwise claim out of her husband's personal estate, has no right to paraphernalia. (*Read v. Snell*, 2 Atk. 644.)

in particular offices or situations in life, neglect to take the oaths to the government: which penalty is given to him or them that will sue for the same. Now, here, it is clear that no particular person, A. or B., has any right, claim, or demand, in or upon this penal sum, till after action brought (a); for he that brings his action, and can *bonâ fide* obtain judgment first, will undoubtedly secure a title to it, in exclusion of every body else. He obtains an inchoate imperfect degree of property, by commencing his suit: but it is not consummated till judgment; for, if any collusion appears, he loses the priority he had gained (b). But, otherwise, the right so attaches in the first informer, that the king (who before action brought may grant a pardon, which shall be a bar to all the world) cannot after suit commenced remit any thing but his own part of the penalty (c). For, by commencing the suit the informer has made the popular action his own private action, and it is not in the power of the crown, or of any thing but parliament, to release the informer's interest. This therefore, is one instance, where a suit and judgment at law are *not only the means of recovering, but also of acquiring, property. And what is said of this one penalty is equally true of all others that are given thus at large to a common informer, or to any person that will sue for the same. They are placed as it were in a state of nature, accessible by all the king's subjects, but the acquired right of none of them: open therefore to the first occupant, who declares his intention to possess them by bringing his action: and who carries that intention into execution, by obtaining judgment to recover them.

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2. Another species of property that is acquired and lost by suit and judgment at law, is that of *damages* given to a man by a jury, as a compensation and satisfaction for some injury sustained; as for a battery, for imprisonment, for slander, or for trespass. Here the plaintiff has no certain demand till after verdict; but, when the jury has assessed his damages, and judgment is given thereupon, whether they amount to twenty pounds or twenty shillings, he instantly acquires, and the defendant loses at the same time, a right to that specific sum. It is true that this is not an acqui-

2. Damages
awarded by a
jury for an in-
jury sustained.

(a) 2 Lev. 141; Stra. 1169; *Combe*
v. *Pitt*, B. R. Tr. 3 Geo. III.

(b) Stat. 4 Hen. VII. c. 20.

(c) Cro. Eliz. 138; 11 Rep. 65.

tion so perfectly original as in the former instance: for here the injured party has unquestionably a vague and indeterminate right to some damages or other, the instant he receives the injury (10); and the verdict of the jurors, and judgment of the court thereupon, do not in this case so properly vest a *new* title in him, as fix and ascertain the *old* one; they do not *give*, but *define*, the right. But, however, though strictly speaking the primary right to a satisfaction for injuries is given by the law of nature, and the suit is only the means of ascertaining and recovering that satisfaction; yet, as the legal proceedings are the only visible means of this acquisition of property, we may fairly enough rank such damages, or satisfaction assessed, under the head of property acquired by suit and judgment at law.

3. Costs and expenses.

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*3. Hither also may be referred, upon the same principle, all title to costs and expenses of suit; which are often arbitrary, and rest entirely on the determination of the court, upon weighing all circumstances, both as to the *quantum*, and also (in the courts of equity especially, and upon motions in the courts of law) whether there shall be any costs at all. These costs, therefore, when given by the court to either party, may be looked upon as an acquisition made by the judgment of law.

(10) See Vol. III. p. 116.

CHAPTER XXX.

OF TITLE BY GIFT, GRANT, AND CONTRACT.

WE are now to proceed, according to the order marked out, to the discussion of two of the remaining methods of acquiring a title to property in things personal, which are much connected together, and answer in some measure to the conveyances of real estates; being those by *gift* or *grant*, and by *contract*: whereof the former vests a property in *possession*, the latter a property in *action*.

VIII. Gifts then, or *grants*, which are the eighth method of transferring personal property, are thus to be distinguished from each other, that *gifts* are always gratuitous, *grants* are upon some consideration or equivalent: and they may be divided, with regard to their subject-matter, into gifts or grants of chattels *real*, and gifts or grants of chattels *personal*. Under the head of gifts or grants of chattels *real*, may be included all leases, for years, of land, assignments, and surrenders of those leases; and all the other methods of conveying an estate less than freehold, which were considered in the twentieth chapter of the present book, and therefore need not be here again repeated: though these very seldom carry the outward appearance of a gift, however freely bestowed; being usually expressed to be made in consideration of blood, or natural affection, or of five or ten shillings nominally paid to the grantor; and in case of leases, always reserving a rent, though it be but a peppercorn; any of which considerations (1) will, in the eye of the

VIII. By gift
or grant,

(1) As to the necessity that every deed should be founded upon a sufficient consideration, see *ante*, p. 296, with the note thereto subjoined; and also, *post*, p. 445.

law, convert the gift, if executed, into a grant; if not executed, into a contract.

which is the act
of transferring
the right of
chattels per-
sonal,

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*Grants or gifts, of chattels *personal*, are the act of transferring the right and the possession of them; whereby one man renounces, and another man immediately acquires, all title and interest therein: which may be done either in writing, or by word of mouth (*a*) attested by sufficient evidence, of which the delivery of possession is the strongest and most essential. But this conveyance, when merely voluntary, is somewhat suspicious; and is usually construed to be fraudulent, if creditors or others become sufferers thereby. And, particularly, by statute 3 Hen. VII. c. 4, all deeds of gift of goods, made in trust to the use of the donor, shall be void: because otherwise persons might be tempted to commit treason or felony, without danger of forfeiture; and the creditors of the donor might also be defrauded of their rights. And by statute 13 Eliz. c. 5, every grant or gift of chattels, as well as lands, with an intent to defraud creditors or others (*b*), shall be void as against such persons to whom such fraud would be prejudicial; but, as against the grantor himself, shall stand good and effectual(2): and all persons partakers in, or privy to, such fraudulent grants, shall forfeit the whole value of the goods, one moiety to the king, and another moiety to the party grieved; and also on conviction shall suffer imprisonment for half a year.

accompanied
with delivery of
possession.

A true and proper gift or grant is always accompanied with delivery of possession, and takes effect immediately: as, if A. gives to B. 100*l.*, or a flock of sheep, and puts him in possession of them directly, it is then a gift executed in the donee; and it is not in the donor's power to retract it, though he did it without any consideration or recompence(*c*): unless it be prejudicial to creditors; or the donor were under any legal incapacity, as infancy, coverture, duress, or the like; or if he were drawn in, circumvented, or imposed upon, by false pretences, ebriety, or surprise(3). But, if the gift does not take effect, by delivery of immediate pos-

(*a*) Perk. s. 57.

(*b*) See 3 Rep. 82.

(*c*) Jenk. 109.

(2) See the first reference given in the preceding note.

(3) See *ante*, pp. 291, 292, 293, with the notes.

session (4), it is then not properly a gift, but a contract :
 *and this a man cannot be compelled to perform, but upon [* 442]

(4) The 72d section of the statute of 6 Geo. IV. c. 16, in substance, enacts, that all goods in the possession of a bankrupt, by permission of the true owner, and whereof the bankrupt is the reputed owner, shall be liable to his creditors. The object of the statute is to make the *reputed* ownership of goods and chattels in the possession of bankrupts, at the time of their bankruptcy, the *real* ownership of such goods and chattels, and to subject them to all the debts of the bankrupt. If there be nothing to qualify the appearance of ownership arising out of possession, the public will naturally give credit to traders on their reputed property ; and the person who permits them to hold out to the world that appearance of their being real owners, ought to be answerable for the consequences. (*Horn v. Baker*, 9 East, 238, *et seq.*) If, indeed, the possession retained by a bankrupt up to the time of his bankruptcy, was a possession according to a limited right of ownership in him, qualified by a right of property in others, that ulterior right will not be affected by the statute, even though credit may have been given on the faith of the absolute property appearing to be in the bankrupt. (*Joy v. Campbell*, 1 Sch. & Lef. 338 ; *Kirkley v. Hodgson*, 1 Barn. & Cress. 599 ; *S. C.* 2 D. & R. 857 ; *Gibson v. Bray*, 8 Taunt. 80.) And where it is a known usage, that certain chattels necessary for carrying on a trade, (as the machinery of a colliery, for instance,) should be demised to a tenant, but the property thereof to remain in the landlord ; there, the mere possession of such things is not evidence of reputed ownership, so as to bring the case within the statute. (*Storer v. Hunter*, 3 Barn. & Cress. 376.) There may also be apparent

possession and reputed ownership, yet the circumstances may rebut the imputation of fraud, even constructively, with reference to the bankrupt laws. Thus, where a wife has, *bond fide*, purchased, through the medium of trustees, the family pictures, plate, furniture, &c., of the house in which she and her husband reside together, though the possession may seem to be in the husband, the property, it should appear, cannot in any way be answerable to his creditors. (*Lady Arundell v. Phipps*, 10 Ves. 145 ; and see *Kidd v. Rawlinson*, 2 Bos. & Pull. 60 ; *Leonard v. Baker*, 1 Mau. & Sel. 252.) And the possession of factors, brokers, lodgers, &c., does not carry, to the understanding of the world, the reputed ownership : (*Horn v. Baker*, 9 East, 245 :) therefore, goods left in the hands of a factor, merely to be by him disposed of on account of his principal, cannot be seized under his commission, should he become bankrupt whilst the goods are in his possession with the consent of the true owner ; for, this case, though within the letter, is not within the meaning of the bankrupt act. (*Ex parte Dumas*, 2 Ves. sen. 585 ; *Copeman v. Gallant*, 1 P. Wms, 314 ; *Taylor v. Plumer*, 3 Mau. & Sel. 575 ; and see the 6th section of the statute of 6 Geo. IV. c. 94, as to the extent to which pledges or contracts by factors or agents, of goods consigned to them, will be binding upon their principals.) The same rule applies to goods of which a man is in possession, at the time of his bankruptcy, as broker, though he is to receive a share of the profits in lieu of brokerage ; (*Smith v. Watson*, 2 Barn. & Cress. 408 ; *S. C.* 3 D. & R. 759 ;) or of which he merely holds the temporary custody, (after having sold the same,) in the ordinary course of business,

good and sufficient consideration; as we shall see under our next division.

and without fraud. (*Flyn v. Matthews*, 1 Atk. 187; *ex parte Mar-
rable*, 1 Glyn & Jameson, 403.) However, in the case last put, it is necessary that the change of property should be notorious, so that third persons, who use reasonable caution, cannot be deceived. (*Knowles v. Horsefall*, 5 Barn. & Ald. 140; *Lingard v. Messiter*, 1 Barn. & Cress. 313; *S. C.* 2 D. & R. 498.)

And it has been repeatedly held, that, if goods seized under an execution are *bonâ fide* sold, should the buyer suffer the debtor to continue in possession of the goods, they will, nevertheless, be protected against subsequent executions, if the circumstances under which he has the possession are known in the neighbourhood. (*Latimer v. Batson*, 4 Barn. & Cress. 654; *S. C.* 7 D. & R. 110; *Muller v. Moss*, 1 Mau. & Sel. 338; *Leonard v. Baker*, *Ibid.* 253; *Watkins v. Birch*, 4 Taunt. 824; *Kidd v. Rawlinson*, 2 Bos. & Pull. 60.) Still, it is a general rule, that a secret owner shall not be allowed to reclaim property which he has left in the visible possession of another, up to the period of his bankruptcy, thereby enabling him to obtain fictitious credit; but, by virtue of the bankrupt act, such property shall vest in the bankrupt's assignees. (*Mace v. Cadell*, Cowp. 232; *ex parte Dale*, Buck, 366.) The possession, however, must continue up to the time of the bankruptcy, to make the statute available to the creditors of the bankrupt's estate: if withdrawn, *bonâ fide*, by the owner at any time, however short, before the bankruptcy, the property cannot be recovered by the assignees. (*Ex parte Smith*, 3 Mad. 66.) But, a removal of property, by the right owner, out of the hands of a person in whose visible possession it has been

left, will be held fraudulent, if such removal appears to have been made in contemplation of, though previous to, the bankruptcy of the person who has been enabled to obtain credit by means of such possession. Such a case would be within the spirit of the act, and the property would vest in the bankrupt's assignees. (*Ex parte Smith*, Buck, 152; *Darby v. Smith*, 8 T. R. 85.)

The statute only applies to property which has been left in the possession of another by the *consent* of the person who has the legal power of dealing with the property. (*Ex parte Richardson*, Buck, 488; *ex parte Dale*, Buck, 366.) And the court of King's Bench (in *Taylor v. Plumer*, 3 Mau. & Sel. 574,) held that, an abuse of trust can confer no rights on the party abusing it, nor on his assignees, or others claiming in privity with him. (See *Gladstone v. Hadwin*, 1 Mau. & Sel. 526; *Scott v. Surman*, Willes, 402.) However, in the subsequent case *Ex parte Dale*, (Buck, 366,) it was determined that, if a trustee, even for infants, part with possession of a chattel interest without receiving payment for the same, he retains no *lien* thereon should the alienee become bankrupt; but the property must be distributed amongst the general creditors of the party in whose visible possession it was at the time of the bankruptcy, with the consent of the person who had the legal power of dealing with the property. The distinction is this: if trust property (clearly distinguishable, *Whitecomb v. Jacob*, 1 Salk. 160,) remain in the possession of the trustee at the time of his bankruptcy, his assignees cannot make title thereto; but if the trustee, though in breach of his trust, have parted with the possession to one who subsequently becomes bankrupt, the

IX. A contract, which usually conveys an interest merely in action, is thus defined: "an agreement upon sufficient

IX. By contract, which is an agreement upon sufficient consi-

case, as it is within all the mischief which the statute was designed to prevent, so it is within the remedial scope and spirit of the act; and the disposition of the property must follow the visible possession.

Not only chattels, but debts, securities, and similar *choses en action*, are within the statute; for these might equally be made the means of obtaining fictitious credit; and as delivery of chattels personal is necessary to divest a bankrupt of the apparent possession, and disposition thereof; so, with respect to debts, in order to take the case out of the statute, there must be an assignment of the same, with notice to the debtor of such assignment, and a delivery of the security, if any, to the assignee. (*Jones v. Gibbons*, 9 Ves. 410; *Ryall v. Rowles*, 1 Ves. sen. 367; *Gordon v. East India Company*, 7 T. R. 237; *ex parte Williams*, 11 Ves. 7.) And if an obligee assign, and actually deliver over, a bond, before he becomes bankrupt, yet, if notice of the assignment be not given to the obligor, the debt will still be held to have been within the order and disposition of the bankrupt; for he might, notwithstanding his assignment, have received the debt, which if the obligor had paid *bond fide*, without notice, he could not have been again called upon to discharge. The assignee, by receiving the assignment without informing the obligor of the transaction, might also enable the obligee fraudulently to obtain credit with the obligor; and if any dealings took place between them without notice of the assignment, the obligor would be entitled to set off any balance due to him upon such dealings, if an action were brought on the bond. *Ex parte Monro*, Buck, 303; *ex parte Burton*, 1 Glyn & Jameson, 209; *ex parte Usborne*, Ibid. 360.)

But, a distinction must be made as to mortgage securities on land: these consist, partly, of the estate in the land; and an assignment, so far as it conveys that estate, is absolute and complete the moment it is made according to the forms of law; which forms do not require any notice to be given to the mortgagor. And as to the bond or covenant which may accompany the mortgage, it would be difficult to say, the mortgage passes and is well assigned to one person, yet the debt remains in another: by the assignment of the mortgage, the debt necessarily passes as incident to it. (*Jones v. Gibbons*, 9 Ves. 410, 411.)

It has been often decided, that the registry of a vessel is *not always* conclusive as to the ownership; and that the ship-register acts are not to be so construed as to render inoperative the provisions of the bankrupt code in cases of visible ownership. Notwithstanding a vessel may have been registered in the name of one partner only, yet, if the apparent ownership and disposition thereof were in the whole partnership, it must, under a commission against them, be treated as joint property. (*Ex parte Burn*, 1 Jac. & Walk. 378; *Monkhouse v. Hay*, 2 Brod. & Bingh. 114; *Mair v. Glennie*, 4 Mau. & Sel. 244; *Robinson v. Macdonnell*, 5 Mau. & Sel. 237.) And it would evidently open a wide door to fraud upon the bankrupt laws, if a person, having registered vessels in the name of another, who becomes bankrupt, were let in to show, that the bankrupt, though in possession as apparent owner, had, in fact, no interest in the ships: it is very clear, no one ought to be heard, in a court of equity, to say that is *his* property, which he has held out to the world to be another's. (*Curtis v.*

deration, to do or forbear to do some particular thing.

“consideration, to do or not to do a particular thing.” From which definition there arise three points to be contemplated in all contracts; 1. The *agreement*: 2. The *consideration*: and 3. The *thing* to be done or omitted; or the different species of contracts.

1. The agreement.

First then it is an *agreement*, a mutual bargain or convention; and therefore there must at least be two contracting parties, of sufficient ability to make a contract: as, where A. contracts with B. to pay him 100*l.*, and thereby transfers a property in such sum to B. Which property is however not in possession, but in action merely, and recoverable by suit at law: wherefore it could not be transferred to another person by the strict rules of the ancient common law: for no *chose* in action could be assigned or granted over (*d*), because it was thought to be a great encouragement to litigiousness, if a man were allowed to make over to a stranger his right of going to law. But this nicety is now disregarded: though, in compliance with the ancient principle, the form of assigning a *chose* in action is in the nature of a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor, in order to recover the possession. And, therefore, when in common

(*d*) Co. Litt. 214.

Perry, 6 Ves. 747; and see *Ex parte Houghton*, 17 Ves. 254.) It is provided, however, by the 72nd section of the stat. 6 Geo. IV. c. 16, that the doctrine held, in bankruptcy, as to reputed ownership and its consequences, shall not invalidate or affect any transfer of a vessel, or a share thereof, made as a security, for any debt by mortgage or assignment duly registered: and although by the 42nd section of the act of 3 & 4 Gul. IV. c. 55, for registering British vessels, it is enacted, that the mortgagee of a vessel or share thereof, is not to be deemed an owner, and that the mortgagor shall not be deemed to have ceased to be owner, except so far as may be necessary to make the vessel, or share, available for payment of the debt which the mortgage was intended

to secure; yet, the 43rd section enacts, that, if transfers of ships, or shares thereof, by way of mortgage, or assignment, in trust for security of debts, are duly registered, the right of the mortgagee, or assignee for the purpose aforesaid, shall not be in any manner affected by any subsequent act of bankruptcy, committed by the mortgagor or assignor, notwithstanding such mortgagor or assignor, at the time he becomes bankrupt, shall have in his possession, order and disposition, and shall be the reputed owner of, the vessel or share mortgaged or assigned as aforesaid; but that such mortgage or assignment shall take place of, and be preferred to, any claim on the part of the assignees under the bankruptcy of the mortgagor or assignor.

acceptation a debt or bond is said to be assigned over, it must still be sued in the original creditor's name; the person to whom it is transferred being rather an attorney than an assignee. But the king is an exception to this general rule, for he might always either grant or receive a *chose* in action by assignment (*e*): and our courts of equity, considering that in a commercial country almost all personal property must necessarily lie in contract, will protect the assignment of a *chose* in action, as much as the law will that of a *chose* in possession (*f*).

*This contract or agreement may be either express or implied (5). *Express* contracts are where the terms of the agreement are openly uttered and avowed at the time of the making, as to deliver an ox, or ten load of timber, or to pay a stated price for certain goods. *Implied* are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform. As, if I employ a person to do any business for me, or perform any work; the law implies that I undertook, or contracted, to pay him as much as his labour deserves. If I take up wares from a tradesman, without any agreement of price, the law concludes that I contracted to pay their real value (6). And there is also one species of implied contracts, which runs through and is annexed to all other contracts, conditions, and covenants, *viz.* that if I fail in my part of the agreement, I shall pay the other party such damages as he has sustained by such my neglect or refusal. In short, almost all the rights of personal property (when not in actual possession) do in great measure depend upon contracts, of one kind or other, or at least might be reduced under some of them: which indeed is the method taken by the civil law; it having referred the greatest part of the duties and rights, which it treats of, to the head of obligations *ex contractu* and *quasi ex contractu* (*g*).

Contracts may be either express or implied;

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A contract may also be either *executed*, as, if A. agrees to change horses with B., and they do it immediately; in which case the possession and the right are transferred to-

either executed or executory.

(*e*) Dyer, 30; Bro. Abr. tit. *Chose in Action*, 1 & 4.

(*f*) 3 P. Wms. 199.

(*g*) Inst. 3. 14. 2.

(5) See Vol. III. p. 153. (6) See *Hoadley v. Maclaine*, 10 Bingham 487.

gether: or it may be *executory*, as, if they agree to change next week; here the right only vests, and their reciprocal property in each other's horse is not in possession but in action; for a contract *executed* (which differs nothing from a grant) conveys a *chose in possession*; a contract *executory* conveys only a *chose in action*.

2. The consideration—without which the contract is void.

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Having thus shown the general nature of a contract, we are, secondly, to proceed to the *consideration* (7) upon which it is founded; or the reason which moves the contracting party to *enter into the contract. "It is an agreement, upon *sufficient consideration*." The civilians hold, that, in all contracts, either express or implied, there must be something given in exchange, something that is mutual or reciprocal (*h*). This thing, which is the price or motive of the contract, we call the consideration: and it must be a thing lawful in itself, or else the contract is void. A *good* consideration, we have before seen (*i*), is that of blood or natural affection between near relations; the satisfaction accruing from which the law esteems an equivalent for whatever benefit may move from one relation to another (*j*). This consideration may sometimes however be set aside, and the contract become void, when it tends in its consequences to defraud creditors or other third persons of their just rights. But a contract for any *valuable* consideration, as, for marriage, for money, for work done, or for other reciprocal contracts, can never be impeached at law; and, if it be of a sufficient adequate value, is never set aside in equity: for the person contracted with has then given an equivalent in recompence, and is therefore as much an owner, or a creditor, as any other person.

Of the classification of considerations by the civilians.

These valuable considerations are divided by the civilians (*h*) into four species: 1. *Do, ut des*: as when I give money or goods, on a contract that I shall be repaid money or goods for them again. Of this kind are all loans of money upon bond, or promise of repayment; and all sales of goods, in which there is either an express contract to pay

(*h*) *In omnibus contractibus, sive nominatis sive innominatis, permutatio continetur.* Gravin. l. 2, s. 12.

(*i*) Pag. 297.

(*j*) 3 Rep. 83.

(*k*) Ff. 19. 5. 5.

(7) See *ante*, p. 296, note.

so much for them, or else the law implies a contract to pay so much as they are worth. 2. The second species is, *facio, ut facias*: as, when I agree with a man to do his work for him, if he will do mine for me; or if two persons agree to marry together; or to do any other positive acts on both sides. Or, it may be to forbear on one side, on consideration of something done on the other; as, that, in consideration A., the tenant, will repair his house, B., the landlord, will not sue him for waste. Or, it may be for mutual forbearance on both sides; *as, that, in consideration that A. [* 445] will not trade to Lisbon, B. will not trade to Marseilles; so as to avoid interfering with each other. 3. The third species of consideration is, *facio, ut des*: when a man agrees to perform any thing for a price, either specifically mentioned, or left to the determination of the law to set a value to it. And when a servant hires himself to his master for certain wages, or an agreed sum of money: here the servant contracts to do his master's service, in order to earn that specific sum. Otherwise, if he be hired generally; for then he is under an implied contract to perform this service for what it shall be reasonably worth. 4. The fourth species is, *do, ut facias*: which is the direct counterpart of the preceding. As, when I agree with a servant to give him such wages, upon his performing such work: which, we see, is nothing else but the last species inverted; for *servus facit, ut herus det*, and *herus dat, et servus faciat*.

A consideration of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum*, or agreement to do or pay any thing on one side, without any compensation on the other, is totally void in law: and a man cannot be compelled to perform it (1) (8). As, if one

A contract without mutuality is void:

(1) Dr. & St. d. 2, c. 24. [See *ante*, p. 296.]

(8) Mr. Christian, in his note upon the text, refers to a "dissertation upon this passage, and the learned judge's observation and reference upon a *nudum pactum* in the preceding page, by Mr. Fonblanque, in his edition of the Treatise of Equity, 1 Vol. p. 326. That learned gentleman abundantly proves, that a consideration was not necessary to constitute a binding con-

tract in the civil law; and he concludes, that, 'from a view of the different modes by which an obligation could be created by the civil law, it appears that, without any consideration, a verbal agreement or promise might, in respect of certain prescribed solemnities, acquire a binding force and legal validity; and further, that, for want of a con-

man promises to give another 100*l.*, here there is nothing contracted for or given on the one side, and therefore there is nothing binding on the other. And, however a man may or may not be bound to perform it, in honour or conscience, which the municipal laws do not take upon them to decide; certainly those municipal laws will not compel the execution of what he had no visible inducement to engage for: and therefore our law has adopted (*m*) the maxim of the civil law (*n*), that *ex nudo pacto non oritur actio*. But any degree of reciprocity will prevent the pact from being nude: nay, even if the thing be founded on a prior moral obligation (as a promise to pay a just debt, though barred by the statute of limitations), it is no longer *nudum pactum* (9). And as this rule was principally established,

but any degree
of reciprocity
will support it.

(*m*) Bro. Abr. tit. *Dette*, 79; Salk. 129.

(*n*) Cod. 2. 3. 10 & 5. 14. 1.

‘sideration, a written acknowledgment of a debt might be avoided; and that, though a consideration was alleged in writing, it might be denied. If then it be asked, what was a *nudum pactum* by the civil law? I should submit that, from the above observations, it appears to have been an undertaking to give or to do some particular thing or act, which *neque verbis præscriptis solemnibus vestitum sit, neque facto aut datione rei transiit in contractum innominatum.*”

(9) Mr. Christian observes, that “where a man is under a moral obligation, which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration. As, if a man promise to pay a just debt, the recovery of which is barred by the statute of limitations; or, if a man, after he comes of age, promise to pay a meritorious debt, contracted during his minority, but not for necessities; or, if a bankrupt, in affluent circumstances after his certificate, promise to pay the whole of his debts; or if a man promise to perform a secret trust, or a

trust void for want of writing by the statute of frauds.

“In such and many other instances, though the promise gives a compulsory remedy where there was none before, either in law or equity; yet, as the promise is only to do what an honest man ought to do, the ties of conscience upon an upright man are a sufficient consideration. (Ld. Mansfield, 1 Cowp. 290.) But, if a bankrupt, after obtaining his certificate, promise to pay a prior debt when he is able, it has been held that this is a conditional promise, and that the plaintiff must prove the defendant’s ability to pay. (2 Hen. Bl. 116.)”

[To give validity to any of the promises and engagements mentioned by Mr. Christian, they must be made in writing, and signed by the party chargeable thereby. See statute, 9 Geo. IV. c. 14.

[A distinction must be made between a *mere* voluntary promise, which is *nudum pactum*, and upon which an action cannot be maintained; and a promise upon the faith of which another does some act—as, entering into engagements, or paying money

to avoid the inconvenience that would arise from setting up mere verbal promises, for which no good reason could *be [* 446] assigned (o), it, therefore, does not hold in some cases, where such promise is authentically proved by written documents. For, if a man enters into a voluntary bond, or gives a promissory note, he shall not be allowed to aver the want of a consideration in order to evade the payment: for every bond from the solemnity of the instrument (p), and every note from the subscription of the drawer (q) (10), carries with it an internal evidence of a good consideration. Courts of justice will, therefore, support them both, as against the contractor himself; but not to the prejudice of creditors, or strangers to the contract.

Bonds, bills of exchange, &c.

(o) Plowd. 308, 309.

(p) Hardr. 200; 1 Ch. Rep. 157.

(q) Ld. Raym. 760.

—forming a consideration that will support an action, and which may, therefore, establish a debt against the assets of the party who gave such promise. (*Crosbie v. M'Doual*, 13 Ves. 160.) But a court of equity will not be more disposed than a court of law to lend any assistance towards perfecting a mere voluntary contract, which remains *in fieri*; even when the transaction is of a nature which would be supported, if it had once received completion. (*Colman v. Sarrell*, 1 Ves. jun. 52, 54; *Willan v. Willan*, 16 Ves. 82; *Antrobus v. Smith*, 12 Ves. 46.)—ED.]

(10) Mr. Christian observes, that “Mr. Fonblanque has taken notice of this inaccuracy: he says, what certainly is fully established, ‘that the want of consideration cannot be averred by the maker of a note, if the action be brought by an indorsee; but, if the action be brought by the payee, the want of consideration is a bar to the plaintiff’s recovering upon it.’ (1 Stra. 674; Bull. N. P. 274.) An indorsee, who has given full value for a bill of exchange, may maintain an action both against him who drew it, and who accepted it, without any consideration. The most import-

ant authority respecting the consideration of written contracts, is the case of *Rann v. Hughes*. (See it reported in 7 T. R. 350.) In that case, Chief Baron Skinner said, that ‘all contracts are, by the laws of England, distinguished into agreements by specialty, and agreements by parol; nor is there any such third class as some of the counsel have endeavoured to maintain, as contracts in writing. If they be merely written, and not specialties, they are parol, and a consideration must be proved. He observed, that the words of the statute of frauds were merely negative, and that executors and administrators should not be liable out of their own estates, unless the agreement upon which the action was brought, or some memorandum thereof, was in writing, and signed by the party. But, this does not prove that the agreement was still not liable to be tried and judged of as all other agreements, merely in writing are, by the common law, and does not prove the converse of the proposition, that, when in writing, the party must be at all events liable.’”

3. The thing to be done or forborne.

We are next to consider, *thirdly*, the thing agreed to be done or omitted. "A contract is an agreement, upon sufficient consideration, *to do or not to do a particular thing*." The most usual contracts, whereby the right of chattels personal may be acquired in the laws of England, are, 1. That of *sale or exchange*. 2. That of *bailment*. 3. That of *hiring and borrowing*. 4. That of *debt*.

Sale or exchange.

1. Sale, or *exchange*, is a transmutation of property from one man to another, in consideration of some price or recompence in value: for there is no sale without a recompence; there must be *quid pro quo* (*r*). If it be a commutation of goods for goods, it is more properly an *exchange*: but, if it be a transferring of goods for money, it is called a *sale*: which is a method of exchange introduced for the convenience of mankind, by establishing an universal medium, which may be exchanged for all sorts of other property; whereas if goods were only to be exchanged for goods, by way of barter, it would be difficult to adjust the respective values, and the carriage would be intolerably cumbersome. All civilized nations adopted, therefore, very early the use of money; for we find Abraham giving "four hundred shekels of silver, current money with the merchant," for the field of Machpelah (*s*): though the practice of exchange still subsists among several of the savage nations. But [* 447] with regard to the *law* of *sales and exchanges, there is no difference. I shall, therefore, treat of them both under the denomination of sales only; and shall consider their force and effect, in the first place, where the vendor *hath* in himself, and secondly where he *hath not* the property of the thing sold.

As to the vendor's right to sell.

Where the vendor *hath* in himself the property of the goods sold, he hath the liberty of disposing of them to whom ever he pleases, at any time, and in any manner: unless judgment has been obtained against him for a debt or damages, and the writ of execution is actually delivered to the sheriff. For then, by the statute of frauds (*t*), the sale shall be looked upon as fraudulent, and the property of the goods shall be bound to answer the debt, from the time of delivering the writ. Formerly it was bound from the *teste*, or issuing, of the writ (*u*), and any subsequent sale was

(*r*) Noy's Max. c. 42.

(*t*) 29 Car. II. c. 3.

(*s*) Gen. c. 23, v. 16.

(*u*) 8 Rep. 171; 1 Mod. 188.

fraudulent; but the law was thus altered in favour of *purchasers*, though it still remains the same between the *parties* (11): and, therefore, if a defendant dies after the awarding, and before the delivery of the writ, his goods are bound by it in the hands of his executors (*v*) (12).

If a man agrees with another for goods at a certain price, he may not carry them away before he hath paid for them; for it is no sale without payment, unless the contrary be expressly agreed. And therefore, if the vendor says, the price of a beast is four pounds, and the vendee says he will give four pounds, the bargain is struck; and they neither of them are at liberty to be off, provided immediate possession be

Requisites in the sale of goods.

(*v*) Comb. 33; 12 Mod. 5; 7 Mod. 95.

(11) According to the old rules, if a defendant die in the vacation, final judgment may be *entered* after his death, as of the preceding term, when he was living; and it will be a good judgment, at common law, as of that term, though the statute of frauds will protect purchasers against the consequences of this relation. As against the deceased defendant's representatives, execution may be sued out when the judgment has been revived by *scire facias*: it is proper, however, that every judgment should be *docketed* as soon after it has been obtained as may be, in order that, if the defendant die before the judgment is actually entered up, his executor may have notice, and not pay debts of an inferior nature. (*Oades v. Woodward*, 1 Salk. 87, 3 Salk. 116; *Robinson v. Tonge*, 3 P. Wms. 399; *Barrow v. Croft*, 6 D. & R. 386; S. C. 4 Barn. & Cress. 388; *Heapy v. Parris*, 6 T. R. 369; *Waghorne v. Langmead*, 1 Bos. & Pull. 572; *Bragner v. Langmead*, 7 T. R. 24; *Berger v. Green*, 1 Mau. & Sel. 230; *Calvert v. Tomlin*, 2 Moore & Payne, 1; S. C. 5 Bing. 3.)

Since this note was first published, it has been ordered by the 4th of the *Regulæ Generales*, of Hil. T. 4 Gul. IV. that all judgments shall be entered of

record of the day of the month and year, whether in term or vacation, when signed, and shall have relation to any other day.

By the 8th of the *Regulæ Generales*, issued in Hil. T. 4 Gul. IV. (in pursuance of the statute of 3 & 4 Gul. IV. c. 42,) it is ordered, that when a defendant shall plead a judgment recovered, he shall in the margin of such plea state the date of such judgment, and if it was recovered in a court of record, the number of the roll on which such proceedings are entered; and if he makes a false statement as to these matters, the plaintiff, on producing a certificate from the officer having the custody of the records of the court where such judgment is alleged to have been recovered, that there is no such record or entry of judgment, shall be at liberty to sign judgment as for want of a plea, by leave of the court or a judge.

(12) Mr. Christian observes, that "if two writs are delivered to the sheriff on the same day, he is bound to execute the first which he receives; but if he levies and sells under the second, the sale to a vendee, without notice of the first, is irrevocable, and the sheriff makes himself answerable to both parties. (1 Salk. 320; 1 T. R. 729.)"

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Statute of
frauds.

tendered by the other side. But, if neither the money be paid, nor the goods delivered, nor tender made, nor any subsequent agreement be entered into, it is no contract, and the owner may dispose of the goods as he pleases (*u*). But, if any part of the price is paid down, if it be but a penny, or any portion of the goods delivered by way of *earnest*, (which the civil law calls *arrha*, and interprets to be “*emptionis-venditionis * contractæ argumentum*” (*w*),) the property of the goods is absolutely bound by it: and the vendee may recover the goods by action, as well as the vendor may the price of them (*x*) (13). And such regard does the law pay to earnest as an evidence of a contract, that, by the same statute, 29 Car. II. c. 3, no contract for the sale of goods, to the value of 10*l.* or more, shall be valid, unless the buyer actually receives part of the goods sold, by way of earnest on his part: or unless he gives part of the price to the vendor by way of earnest to bind the bargain, or in part of payment; or unless some note in writing be made and signed by the party, or his agent, who is to be charged with the contract (14). And, with regard to goods under

(*u*) Hob. 41; Noy's Max. c. 42.(*w*) Inst. 3, tit. 24.(*x*) Noy, *ibid.*

(13) Mr. Christian observes, that “the property does not seem to be *absolutely bound* by the earnest; for Lord Holt has laid down the following rules, *viz.* ‘that, notwithstanding the earnest, the money must be paid upon fetching away the goods, because no other time for payment is appointed; that earnest only binds the bargain, and gives the party a right to demand; but then a demand without the payment of the money is void; that, after earnest given, the vendor cannot sell the goods to another, without a default in the vendee; and, therefore, if the vendee does not come and pay, and take the goods, the vendor ought to go and request him; and then, if he does not come and pay, and take away the goods in convenient time, the agreement is dissolved, and he

‘is at liberty to sell them to any other person.’ (1 Salk. 113.)”— [The qualified sense in which our author intended to be understood, when he said that “the property of goods is absolutely bound by the payment of part of the price, by way of earnest,” is made clear enough by the next paragraph of the text.—*ED.*]

(14) In the case of *Rondeau v. Wyatt*, (1 H. Bla. 66; S. C. 1 Br. 155,) the court of Common Pleas said, “it is singular that an idea could ever prevail that this section of the statute was only applicable to cases where the bargain was immediate; for it seems plain, from the words made use of, that it was meant to regulate executory, as well as other, contracts. And, indeed, this provision of the statute would not be of

the value of 10*l.*, no contract or agreement for the sale of them shall be valid, unless the goods are to be delivered within one year, or unless the contract be made in writing, and signed by the party, or his agent, who is to be charged therewith. Anciently, among all the northern nations, shaking of hands was held necessary to bind the bargain; a custom which we still retain in many verbal contracts. A sale thus made was called *handsale* "*venditio per mutuum manuum complexionem*" (*y*); till in process of time the same word was used to signify the price or earnest, which was given immediately after the shaking of hands, or instead thereof.

As soon as the bargain is struck, the property of the goods is transferred to the vendee, and that of the price to the vendor; but the vendee cannot take the goods, until he tenders the price agreed on (*z*). But, if he tenders the money to the vendor, and he refuses it, the vendee may seize the goods, or have an action against the vendor for detaining them. And by a regular sale, without delivery, the property is so absolutely vested in the vendee, that if A. sells a horse to B. for 10*l.* and B. pays him earnest, or signs a note in writing of the bargain; and afterwards, before the delivery of the horse or money paid, the horse dies in the vendor's custody; still he is entitled to the money, because, by the *contract, the property was in the vendee (*a*). Thus may property in goods be transferred by sale, where the vendor *hath* such property in himself.

On a sale of goods, the property of them is immediately transferred to the vendee, and that of the price to the vendor.

[* 449]

(*y*) Stiernhook de jure Goth. l. 2, c. 5.

(*z*) Hob. 41.

(*a*) Noy, c. 42.

much use unless it were to extend to executory contracts; for it is from bargains to be completed at a future period that the uncertainty and confusion are most likely to arise, which the statute was designed to prevent."

This construction was adopted by Lord Kenyon in *Cooper v. Elston*, (7 T. R. 16,) and by the whole court of King's Bench in *Garbutt v. Watson*, (1 Dowl. & Ryl. 221; S. C. 5 Barn. & Ald. 615,) and in *Baldey v. Parker*. (3 Dowl. & Ryl. 223; S. C. 2 Barn. & Cress. 41.) It is true that, where the

subject matter of a contract does not, at the time, exist *in rerum natura*, and consequently is incapable of delivery and of part acceptance, there the contract has sometimes been considered as not within the statute of frauds; (*Groves v. Buck*, 3 Mau. & Sel. 179;) but, in all the cases cited in this note, that construction has been discountenanced, and at all events there seems no disposition in courts either of law or equity, to extend it to cases which are not the same *in specie* with existing precedents.

Sales in market
overt.

But property may also in some cases be transferred by sale, though the vendor *hath none at all* in the goods: for it is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase; otherwise all commerce between man and man must soon be at an end. And therefore the general rule of law is (*b*), that all sales and contracts of any thing vendible, in fairs or markets *overt* (15), (that is, open,) shall not only be good between the parties, but also be binding on all those that have any right or property therein. And for this purpose, the *mirroir* informs us (*c*), were tolls established in markets, *viz.* to testify the making of contracts; for every private contract was discountenanced by law: insomuch, that our Saxon ancestors prohibited the sale of any thing above the value of twenty pence, unless in open market, and directed every bargain and sale to be contracted in the presence of credible witnesses (*d*). Market overt in the country is only

(*b*) 2 Inst. 713.

(*c*) C. 1, s. 3.

(*d*) LL. Ethel. 10, 12; LL. Eadg.

Wilk. 80.

(15) Lord Hardwicke, in the case of *Lowthal v. Tonkins*, (Barnard. Cha. Ca. 42; S. C. 2 Eq. Ca. Ab. 381,) said, "before the statute of frauds, a defendant's goods were bound, in his hands, from the *teste* of the writ of execution. To avoid this, that statute was made; whereby it is directed, that the goods shall only be bound from the delivery of the writ to the sheriff. But neither before the statute, nor since, is the property of the goods altered, but continues in the defendant till the writ of execution is executed. But then it may be asked, what is the meaning of those words of the statute, whereby it is said that the goods shall be bound from the delivery of the writ to the sheriff? The meaning is, that, after the writ is so delivered to the sheriff, if the defendant makes an assignment of his goods, *unless in market overt*, the sheriff may take them in execution.

If stolen goods are sold in market overt, and afterwards, but before con-

viction of the felon, notice is given to the purchaser by the right owner, that the goods are his property, notwithstanding which the purchaser resells them; the right owner cannot, after conviction, recover from the first purchaser, because the sale in market overt protected the goods until conviction, and therefore the first purchaser was at liberty to make a re-sale during the protection, and was not bound to keep possession of the goods, when it was doubtful whether the felon would, or would not, be convicted: but, unquestionably, if the re-sale had been made after the protection had ceased, an action of trover might have been maintained against the first purchaser. (*Horwood v. Smith*, 2 T. R. 755; *Featherstonhaugh v. Johnston*, 8 Taunt. 238; and see the fourth volume of these commentaries, p. 363. See, also, the next note but one, *infra*, and the further reference there given.)

held on the special days provided for particular towns by charter or prescription; but in London every day, except Sunday, is market day (*e*). The market place, or spot of ground set apart by custom for the sale of particular goods, is also in the country the only market overt (*f*); but in London every shop in which goods are exposed publicly to sale, is market overt, for such things only as the owner professes to trade in (*g*). But if my goods are stolen from me, and sold, out of market overt, my property is not altered, and I may take them wherever I find them. And it is expressly provided by statute 1 Jac. I. c. 21, that the sale of any goods wrongfully (16) taken, to any pawnbroker in London, or within two miles thereof, shall not alter the property: for this, being usually a clandestine trade, is therefore made an exception to the general rule. And, even in market overt, if the goods be the property of the king, such sale (though regular in all other respects) *will in no case bind him; though it binds infants, feme-coverts, idiots, or lunatics, and men beyond sea or in prison; or if the goods be stolen from a common person, and then taken by the king's officer from the felon, and sold in open market; still, if the owner has used due diligence in prosecuting the thief to conviction, he loses not his property in the goods (*h*) (17). So likewise, if the buyer knoweth the property not to be in the seller; or there be any other fraud in the transaction; if he knoweth the seller to be an infant, or feme-covert not usually trading for herself (18); if the sale

Pawnbrokers.

[* 450]
Infants, feme-coverts, &c.

(e) Cro. Jac. 68.

(g) 5 Rep. 83; 12 Mod. 521.

(f) Godb. 131.

(h) Bacon's Use of the Law, 158.

(16) But, it seems, the "wrongful taking" must be felonious, not merely fraudulent; for, in *Parker v. Patrick*, (5 T. R. 175,) it was held, that if goods be obtained from A. by fraud, and pawned to B., without notice, and A. prosecute the offender to conviction, and get possession of the goods, B. may maintain trover for them.

(17) To encourage the prosecution of offenders, it is enacted, by the 57th section of the statute of 7 & 8 Geo. IV. c. 29, that the owner of stolen pro-

perty, prosecuting the thief or receiver to conviction, shall have restitution of his property; with an exception as to securities, or negotiable instruments, which have been transferred *bonâ fide*, for a just and valuable consideration, without any notice, or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, or converted. See the first note to p. 449, and the next paragraph of the text.

(18) A *feme coverte* is not under a

be not originally and wholly made in the fair or market, or not at the usual hours; the owner's property is not bound thereby(*i*). If a man buys his own goods in a fair or market, the contract of sale shall not bind him, so that he shall render the price: unless the property had been previously altered by a former sale(*k*). And, notwithstanding any number of intervening sales, if the original vendor, who sold without having the property, comes again into possession of the goods, the original owner may take them, when found in his hands who was guilty of the first breach of justice(*l*). By which wise regulations the common law has secured the right of the proprietor in personal chattels from being divested, so far as was consistent with that other necessary policy, that purchasers *bonâ fide*, in a fair, open, and regular manner, should not be afterwards put to difficulties by reason of the previous knavery of the seller.

As to sales of
horses in fairs
or markets.

But there is one species of personal chattels, in which the property is not easily altered by sale, without the express consent of the owner, and those are horses(*m*). For a purchaser gains no property in a horse that has been stolen, unless it be bought in a fair or market overt, according to the directions of the statutes 2 P. & M. c. 7, and 31 Eliz. c. 12 (19). By which it is enacted, that the horse shall be openly exposed, in the time of such fair or market, for one whole hour together, between ten in the morning

(*i*) 2 Inst. 713, 714.

(*k*) Perk. s. 93.

(*l*) 2 Inst. 713.

(*m*) Ibid. 719.

total disability to contract; (*Stephenson v. Hardy*, 3 Wils. 390;) by her husband's permission she may engage in trade, and his tacit assent may render any sale or agreement entered into by her, obligatory upon him. (*Bowyer v. Peake*, 2 Freem. 215.) A husband may be concluded by the receipt of his wife, when he has been in the habit of permitting her to pay and receive money, (*Seaborne v. Blackston*, 2 Freem. 178,) or by her admission of demands in respect of a business which she has been in the habit of conducting whenever her husband was absent: (*Clifford v. Burton*, 1

Bingh. 200; S. C. 8 Moore, 16:) for, a *feme covert* may be the attorney of her husband. (*Crayker v. Parrett*, 2 Freem. 19.) But, unless there is distinct evidence of the husband's assent to his wife's carrying on business for her separate use, the profits belong to the husband, and whatever she purchases therewith must equally belong to him. (*Lamphir v. Creed*, 8 Ves. 599.)

(19) The 5th section of this statute of Eliz., which enacted, that all accessories to horse-stealing should be deprived of the benefit of clergy, has been repealed by the act of 7 & 8 Geo. IV. c. 27.

and sunset, in the public place used for such sales, and not in any private yard or stable; and afterwards brought by both the vendor and vendee to the book-keeper of such fair or market: that toll be paid, if any *be due; and if not, [* 451] one penny to the book-keeper, who shall enter down the price, colour, and marks of the horse, with the names, additions, and abode of the vendee and vendor; the latter being properly attested. Nor shall such sale take away the property of the owner, if within six months after the horse is stolen he puts in his claim before some magistrate, where the horse shall be found; and, within forty days more, proves such his property by the oath of two witnesses, and tenders to the person in possession such price as he *bonâ fide* paid for him in market overt. But, in case any one of the points before mentioned be not observed, such sale is utterly void; and the owner shall not lose his property, but at any distance of time may seize or bring an action for his horse, wherever he happens to find him.

By the civil law(*n*) an implied warranty was annexed to every sale, in respect to the title of the vendor; and so too in our law, a purchasor of goods and chattels may have a satisfaction from the seller, if he sells them as his own and the title proves deficient, without any express warranty for that purpose(*o*). But with regard to the goodness of the wares so purchased, the vendor is not bound to answer: unless he expressly warrants them to be sound and good(*p*) (20), or unless he knew them to be otherwise and

As to warranty of the vendor's title to the goods, and of their quality.

(*n*) Ff. 21, 2, 1.

[Vol. III. p. 165.]

(*o*) Cro. Jac. 474; 1 Roll. Abr. 90.

(*p*) F. N. B. 94.

(20) In the case of *Jones v. Bright*, (decided in the court of Common Pleas in Easter Term, 1829,) the plaintiff, a ship-owner, sued the defendant, a manufacturer of copper, on an *implied* warranty, on a sale of copper for sheathing the plaintiff's vessel, that the copper was reasonably fit and proper for the purpose for which it was sold. It appeared by the evidence, that, in consequence of some improper treatment in the manufacture, by which the copper had imbibed too great a portion of oxygen,

its decay was materially accelerated, it being thereby rendered less capable of resisting the action of the salt water. Best, C. J., left it to the jury to say, whether the decay of the sheathing were produced by intrinsic or extrinsic causes. The jury found that its decay arose from some *intrinsic* defect in the quality. The court, after argument *in banc*, held the defendant liable, and said, that a person who sells goods, *manufactured by himself*, knowing the purpose for which they are to be used by the purchaser, *impliedly* warrants

hath used any art to disguise them (*q*), or unless they turn out to be different from what he represented them to the buyer (21).

(*q*) 2 Roll. Rep. 5.

that they are reasonably fit and proper for that purpose, and is answerable for *latent* defects, inasmuch as, being the maker, he has the means of ascertaining and of guarding against those defects, whereas the purchaser must necessarily be altogether ignorant of them. (The case is now reported, in 5 Bingham. 533—550.)

(21) Mr. Christian observes, that “the following distinctions seem peculiarly referable to the sale of horses. If the purchaser gives what is called a *sound* price, that is, such as from the appearance and nature of the horse would be a fair and full price for it, if it were in fact free from blemish and vice, and he afterwards discovers it to be unsound or vicious, and returns it in a reasonable time, he may recover back the price he has paid, in an action against the seller for so much money had and received to his use, provided he can prove the seller knew of the unsoundness or vice at the time of the sale; for the concealment of such a material circumstance is a fraud, which vacates the contract.

“But if a horse is sold with an express warranty by the seller that it is sound and free from vice, the buyer may maintain an action upon this warranty or special contract without returning the horse to the seller, or without even giving him notice of the unsoundness or viciousness of the horse; yet it will raise a prejudice against the buyer’s evidence, if he does not give notice within a reasonable time that he has reason to be dissatisfied with his bargain. (H. Bl. 17.)

“The warranty cannot be tried in a general action of *assumpsit* to recover back the price of the horse. (Cowp. 819.) In a warranty it is not necessary to show that the seller knew of the

horse’s imperfections at the time of the sale.”

[That a warranty does not bind in respect of patent and obvious defects, was held in *Dyer v. Hargrave*, (10 Ves. 597,) in *Grant v. Munt*, (Cooper, 177,) and in *Pasley v. Freeman*. (3 T. R. 54.) However, in *Wall v. Stubbs*, (1 Mad. 81,) Sir Thomas Plumer, V. C. declared, that any misrepresentation, whether of a fact latent or patent, might be successfully urged in opposition to a demand of specific performance, unless the purchaser actually knew how the fact really stood. (*Margetson v. Wright*, 7 Bingham. 605; S. C. 5 Moore & P. 606.) The *dicta* may perhaps be reconciled, by taking this distinction: a party who had the full means of detecting the misrepresentation, and ascertaining the truth, has no right to complain, unless some illegal means have been resorted to for the purpose of throwing him off his guard. But it seems not sufficient to exclude a purchaser from the benefit of a warranty, that a defect should be obvious to the generality of observers: thus as to the example put in *Bayly v. Merril*, (Cro. Jac. 387,) and alluded to in *Dyer v. Hargrave*, (before cited,) of a one-eyed horse, sold with a warranty that he has both eyes perfect, this would be a tolerably strong instance of a patent defect; yet if the purchaser were a blind man, such a warranty given to him would, according to the year-books, not be binding. (See 3 Stark. 26, n.) If a buyer asks for a carriage horse, or a horse to carry a female, or a timid or infirm rider, he who knows the qualities of the animal, and sells, undertakes, on every principle of honesty, that it is fit for the purpose indicated. The selling, upon

2. Bailment, from the French *bailler* (22), to deliver, is a delivery of goods in trust, upon a contract expressed or implied, that the trust shall be faithfully executed on the part of the bailee (23). As if cloth be delivered, or (in our legal dialect) bailed, to a tailor to make a suit of clothes, he has it upon an implied contract, to render it again when made (24),

Bailments of
cattle, goods, &c.

a demand for a horse with particular qualities, is an affirmation that he possesses those qualities. (*Jones v. Bright*, 5 Bingh. 544; *S. C.* 3 M. & P. 155.)

[This is principally extracted from 2 Hovenden's Notes to Vesey jun.'s Reports, 238.—ED.]

(22) Contracts of bailment are divisible into several species, but the French verb “*bailler*” is applied, in that language, to one only of those species namely, *letting to hire*. (See Dict. de l'Academie.)

(23) This is the definition of what our law deems a *proper* bailment; but, goods may be legally in the hands of the possessor, upon trust to be re-delivered, in consequence of some distinct, collateral contract; or by finding such goods; and this possession is termed *improper* bailment. (*Jones's Law of Bailm.* 117.)

(24) Provided he has a just satisfaction for his labour tendered to him. (*Chapman v. Allen*, Cro. Car. 272.) But, whether a certain stipulated sum is fixed, by express agreement, at the time of the delivery of a chattel to a workman, as the price or reward which he is to receive for bestowing his labour thereon; or whether his claim depends upon an implied contract, that he should be paid a reasonable price or sum; it seems now settled, that his *lien* and right of retainer until he receives just satisfaction, exists equally in both cases. (*Chase v. Westmore*, 5 Mau. & Sel. 184.) No doubt, a person who, by the usage of trade, has a *lien* on goods in his hands, for work performed upon them, and further (as the usage in some cases is) for work upon other goods not then in his

possession, (they having been delivered over,) may, by substituting a special contract for the implied one, part with the *lien* which the implied contract would have given him: he may stipulate for such a particular mode of payment as would be apparently inconsistent with a right to detain the possession. (*Cowell v. Simpson*, 16 Ves. 279.) But, though in cases of such an express antecedent contract, no *lien*, inconsistent therewith, can arise out of an implied contract; (*Stevenson v. Blakelock*, 1 Mau. & Sel. 543;) still, the convenience of commerce and natural justice are on the side of *liens*, and therefore courts lean that way; 1st. where there is an express contract to that effect; 2ndly, where it is implied from the usage of trade; or 3rdly, from the manner of dealing between the parties; or 4thly, where the claimant of the *lien*, has acted as a factor. (*Green v. Farmer*, 4 Burr. 2221; *Kirkham v. Shawcross*, 6 T. R. 18.) In *Houghton v. Matthews*, (3 Bos. & Pull. 494,) it was judicially observed, there are two species of *liens* known to the law—namely, particular *liens*, and general *liens*. Particular *liens* arise where persons claim a right to retain goods in respect of labour or money expended upon them; and these *liens* are favoured in law. General *liens* are claimed in respect of a general balance of account; and these are founded in custom only, and are, therefore, to be taken strictly. If, in any particular case, a custom, establishing a general *lien* be made out, it may prevail, as it did in *Ex parte Deeze*, (1 Atk. 229,) but, (it was added,) there is no authority for the posi-

and that in a workmanly manner(*r*). If money or goods be delivered to a common carrier, to convey from Oxford to London, he is under a contract in law to pay, or carry, them to the person appointed(*s*)(25). If a horse or other goods,

(*r*) 1 Vern. 268.

(*s*) 12 Mod. 482.

tion, that a factor may retain goods in his hands in respect of all debts whatsoever, whether connected with his employment as factor or not; and there is a rule of law which appears to be decisive of the contrary, namely, that nothing can fall within the custom of trade but what concerns trade: from which it should seem to follow, that *collateral* money obligations are not within the custom which authorises a factor to retain for a general balance due to him. The decisions upon questions of this kind have, in many cases, been principally founded upon evidence given of the usage of the particular trade in respect of which they arose; and that such evidence has by no means been uniform, see *Green v. Farmer*, (4 Burr. 2222,) and *Olive v. Smith*. (5 Taunt. 60.) In *Walker v. Birch*, (6 T. R. 262,) the general rule of law, that a factor has a *lien* on the goods deposited with him for the general balance due to him, from the depositor, was not disputed; but it was held in that case, as the goods there in question were deposited for a particular purpose, and the factor received them on those terms, the right of *lien* was waved. The statutes of 4 Geo. IV. c. 83, and of 6 Geo. IV. c. 94, secure to the consignees of goods for sale a *lien* thereon, for any advances made to, or for the use of the consignors, whether such consignors be, or be not, the true owners of the goods; provided the consignees had not, at the time of making such advances, notice that the goods were not the property of the consignors: and the consignees may pledge the goods, but the pledgees will acquire no further right or interest in the said

goods than the consignees, or agents, at the time of making the pledge, could have enforced; and the true owner of the goods may recover them from the consignees, or from any third person with whom they have been pledged, upon re-payment of such advances as aforesaid.

(25) A common carrier, by the nature of his contract, is liable to answer for any negligence; and, by the common law, incurs a further degree of responsibility; he is liable for every accident, except by the act of God, or the king's enemies. By the act of God, is here understood such act as could not happen by the intervention of man, as storms, lightning, and tempests. (*Forward v. Pittard*, 1 T. R. 33.) In an action of *assumpsit* against a carrier, evidence to prove negligence is admissible; and a gross neglect will defeat the usual notice given by carriers for the purpose of limiting their responsibility. (*Smith v. Horne*, 8 Taunt. 146; *S. C.* 2 Moore, 18; *Garnett v. Willan*, 5 Barn. & Ald. 60; *Sleat v. Fagg*, Ibid. 348; *Duff v. Budd*, 3 Brod. & Bing. 179; *S. C.* 6 Moore, 469; *Beck v. Evans*, 16 East, 247; *Bodenham v. Bennett*, 4 Price, 33.) The *lien* of a common carrier for his general balance is certainly not founded in common law: and though the court of King's Bench, in *Rushforth v. Hadfield*, (6 East, 525, 529,) did not deny that, if a general usage to that effect in favour of carriers were sufficiently proved, the court might feel bound to support it; still it was held that the evidence in support of such usage must be very clear and satisfactory, and that the claim was by no means one to be favoured.

be delivered to an inn-keeper or his servants, he is bound to keep *them safely, and restore them when his guest leaves the house(*t*)(26). If a man takes in a horse, or other cattle, to graze and depasture in his grounds, which the law calls *agistment*, he takes them upon an implied contract to return them on demand to the owner(*u*)(27). If a pawnbroker receives plate or jewels as a pledge, or security, for the re-payment of money lent thereon at a day certain, he has them upon an express contract or condition to restore them, if the pledgor performs his part by redeeming them in due time(*w*): for the due execution of which contract many useful regulations are made by statute 30 Geo. II. c. 24(28). And so, if a landlord distrains goods for rent, or a parish officer for taxes, these for a time are only a pledge in the hands of the distrainers, and they are bound, by an implied contract in law, to restore them on payment of the debt, duty, and expenses, before the time of sale; or, when sold, to render back the overplus(29). If a friend delivers any thing to his friend to keep for him, the receiver is bound to restore it on demand: and it was formerly held, that, in the mean time, he was answerable for any damage or loss it might sustain, whether by accident or otherwise(*x*); unless he expressly undertook(*y*) to keep it only with the same care

(*t*) Cro. Eliz. 622.

(*x*) Co. Litt. 89.

(*u*) Cro. Car. 271.

(*y*) 4 Rep. 84.

(*w*) Cro. Jac. 245; Yelv. 178.

(26) He may retain the horse, till payment has been made for what the horse has eaten. (*Robinson v. Waller*, 1 Rolle's Rep. 449.)

(27) And he cannot retain them till payment; innkeepers and common carriers are compelled to receive guests, and to convey goods; but the law does not oblige any one to take cattle into pasture; consequently, whoever does so, without a special agreement, gives credit to the person of the owner. (Bacon's Abr. *Bailment*, C.)

(28) These regulations, with many additional ones, are consolidated in the statute of 39 & 40 Geo. III. c. 99.

(29) Distresses being in the nature of pledges, and giving no property in

the thing distrained, (*Mores v. Conham*, Owen, 124,) they oftentimes proved of little benefit, under the old law, towards hastening payment; for remedy whereof it was enacted by the statute of 2 W. & M. sess. 1, c. 5, that, if the owner of goods and chattels which have been distrained for rent, shall not, within five days next after such distress taken, and notice thereof (with the cause of such taking,) left on the most notorious place on the premises charged with the rent distrained for, replevy the same; the said goods and chattels may be appraised and sold, in the manner by the act directed.

As to the
bailee's liability
in case of loss
or damage.

as his own goods, and then he should not be answerable for theft or other accidents. But now the law seems to be settled(*z*), that such a general bailment will not charge the bailee with any loss, unless it happens by gross neglect, which is an evidence of fraud: but, if he undertakes specially to keep the goods safely and securely, he is bound to take the same care of them, as a prudent man would take of his own(*a*) (30).

The bailee has
a qualified pro-
perty in the
goods delivered
to him, and may
maintain actions
against those
who abstract or
injure them.

[* 453]

In all these instances there is a special qualified property transferred from the bailor to the bailee, together with the possession. It is not an absolute property, because of his *contract for restitution; the bailor having still left in him the right to a *chose* in action, grounded upon such contract. And, on account of this qualified property of the bailee, he may (as well as the bailor) maintain an action against such as injure or take away these chattels. The tailor, the carrier, the inn-keeper, the agisting farmer, the pawnbroker, the distreinor, and the general bailee, may all of them vindicate, in their own right, this their possessory interest, against any stranger or third person(*b*). For, being responsible to the bailor, if the goods are lost or damaged by his wilful default or gross negligence, or if he do not deliver up the chattels on lawful demand, it is, therefore, reasonable that he should have a right of action against all other persons who may have purloined or injured them; that he may always be ready to answer the call of the bailor (31).

(*z*) Lord Raym. 909 ; 12 Mod. 487.

(*a*) By the laws of Sweden, the depository or bailee of goods is not bound to restitution, in case of accident by fire or theft: provided his own

goods perished in the same manner:

"*jura enim nostra*," says Steirnhook, "*dolum præsumunt, si una non perant.*" (*De jure Sueon.* l. 2, c. 5.)

(*b*) 13 Rep. 69.

(30) The notion that an acceptance to keep, and a special acceptance to keep *safely*, are one and the same contract, was denied by the whole court in *Coggs v. Bernard*, (2 Lord Raym. 913,) and in the same case, as well as in Jones's Law of Bailment (pp. 42 & 120,) it is laid down that, a friendly depository, under an acceptance generally, is responsible only for gross neglect; and not even for that, if his character was previously known to the

depositor, and he takes no better care of his own goods, which are at the same time also spoiled or destroyed.

(31) Mr. Christian observes, "the learned judge has classed indiscriminately together a number of bailments, dissimilar in their nature and legal consequences. In order to acquire a knowledge of the numerous and nice distinctions which the law of bailments comprehends, the student should peruse Lord Holt's judgment

3. Hiring and *borrowing* are also contracts by which a qualified property may be transferred to the hirer or borrower: in which there is only this difference, that hiring is always for a price, a stipend, or additional recompence; borrowing is merely gratuitous. But, the law in both cases is the same (32). They are both contracts, whereby the possession and a transient property is transferred for a particular time or use, on condition to restore the goods so hired or borrowed, as soon as the time is expired or use performed; together with the price or stipend (in case of hiring) either expressly agreed on by the parties, or left to be implied by law, according to the value of the service. By this mutual contract, the hirer or borrower gains a temporary property in the thing hired, accompanied with an implied condition to use it with moderation, and not abuse it (33); and the owner or lender retains a reversionary inte-

Hiring or borrowing.

in the report of *Coggs v. Bernard*, in Lord Raym. 909; and afterwards Sir William Jones's Essay on the Law of Bailments.

"Sir William Jones divides neglect into three kinds, which he thus defines:

" 'Ordinary neglect is the omission of that care, which every man of common prudence, and capable of governing a family, takes of his own concerns.

" 'Gross neglect is the want of that care, which every man of common sense, how inattentive soever, takes of his own property.

" 'Slight neglect is the omission of that diligence, which very circumspect and thoughtful persons use in securing their own goods and chattels.' "

(32) Mr. Christian intimates, that "the learned commentator has here followed Lord Holt, who has treated a *commodatum* and a *locatio* without distinction. (Lord Raym. 916.) But this seems to be properly corrected by Sir W. Jones, 85; who concludes, that the hirer of a thing is answerable only for ordinary neglect; but that

a gratuitous borrower is responsible even for slight negligence. (Ib. 120.)"

(33) In the second dialogue between the Doctor and Student, chap. 38, this subject is discussed; and it is there laid down, that, if a man lend another a horse, which loan is properly called a *commodatum*, if the horse perish by any accident which could not reasonably be foreseen and provided against, the lender must bear the loss; but, if the casualty occur through the carelessness of the borrower, he must answer for his negligence. And it is added, a man may have of another, by way of loan, money, corn, wine, and such other things which cannot be specifically re-delivered, if the borrower makes use of them, but their value must be restored. And, as such things may be used by the borrower *as his own*, if they perish it is at his jeopardy: but such borrowed articles as are to be re-delivered, the borrower must not use or occupy, except in such manner as they were borrowed for: and if, in that occupation they perish, without his default, he will not be responsible; though, if such things be occupied otherwise than according to the intent

rest in the same, and acquires a new property in the price or reward. Thus, if a man hires or borrows a horse for a month, he has the possession and a qualified property therein during that period; on the expiration of which his qualified property determines, and the owner becomes (in case of hiring) entitled also to the price for which the horse was hired (c).

Of interest or
usury.

[* 454]

*There is one species of this price or reward, the most usual of any, but concerning which many good and learned men have, in former times, very much perplexed themselves and other people, by raising doubts about its legality *in foro conscientiae*. That is, when money is lent on a contract to receive not only the principal sum again, but also an increase by way of compensation for the use; which generally is called *interest* by those who think it lawful, and *usury* (34) by those who do not so. For the enemies to interest in general make no distinction between that and usury, holding any increase of money to be indefensibly usurious. And this they ground as well on the prohibition of it by the law of Moses among the Jews, as also upon what is said to be laid down by Aristotle (d), that money is naturally barren, and to make it breed money is preposterous, and a perversion of the end of its institution, which was only to serve the purposes of exchange, and not of increase. Hence, the school divines have branded the practice of taking interest, as being contrary to the divine law both natural and revealed; and the canon law (e) has proscribed the taking any, the least, increase for the loan of money as a mortal sin.

Interest for the
loan of money
is expressly
proscribed by
the canon law.

(c) Yelv. 172; Cro. Jac. 236.

(d) Polit. l. 1, c. 10. This passage

hath been suspected to be spurious.

(e) Decretal, l. 5, tit. 19.

of the loan, and in such occupation they perish, in what wise soever they perish, he that borrowed them shall be charged therewith in law and conscience. Also, if a man have goods to keep, under a general bailment, whether he have or have not any recompence for the keeping, he shall stand charged or not charged for their loss, as default or no default shall be in him: but, if he be a bailee for hire, and, at the time of the delivery, ex-

pressly promise to re-deliver the goods safe, then he shall be charged with all chances that may fall: though, even if he make that promise, but is to have nothing for the keeping, he is bound to answer for no casualties except such as arise in consequence of his own wilful default; for, upon a *nudum pactum*, or naked promise, no action lieth.

(34) Vol. IV. p. 156.

But, in answer to this, it hath been observed, that the Mosaical precept was clearly a political, and not a moral precept. It only prohibited the Jews from taking usury from their brethren the Jews; but in express words permitted them to take it of a stranger (*f*): which proves that the taking of moderate usury, or a reward for the use, for so the word signifies, is not *malum in se*; since it was allowed where any but an Israelite was concerned. And as to the reason supposed to be given by Aristotle, and deduced from the natural barrenness of money, the same may with equal force be alleged of houses, which never breed houses; and twenty other things, which nobody doubts it is lawful to make profit of, by letting them to hire. And though money was originally used only for the purposes of exchange, yet the laws of any state *may be well justified in permitting it to be turned to the purposes of profit, if the convenience of society (the great end for which money was invented) shall require it. And that the allowance of moderate interest tends greatly to the benefit of the public, especially in a trading country, will appear from that generally acknowledged principle, that commerce cannot subsist without mutual and extensive credit. Unless money therefore can be borrowed, trade cannot be carried on: and if no premium were allowed for the hire of money, few persons would care to lend it; or at least the ease of borrowing at a short warning (which is the life of commerce) would be entirely at an end. Thus, in the dark ages of monkish superstition and civil tyranny, when interest was laid under a total interdict, commerce was also at its lowest ebb, and fell entirely into the hands of the Jews and Lombards: but when men's minds began to be more enlarged, when true religion and real liberty revived, commerce grew again into credit; and again introduced with itself its inseparable companion, the doctrine of loans upon interest. And, as to any scruples of conscience, since all other conveniences of life may either be bought or hired, but money can only be hired, there seems to be no greater oppression in taking a recompence or price for the hire of this, than of any other convenience. To demand an exorbitant price is equally contrary to conscience, for the loan of a horse, or the loan

As to the Mosaic law upon this subject.

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The propriety of taking interest considered.

(*f*) Deut. xxiii. 20.

of a sum of money: but a reasonable equivalent for the temporary inconvenience which the owner may feel by the want of it, and for the hazard of his losing it entirely, is not more immoral in one case than it is in the other. Indeed, the absolute prohibition of lending upon any, even moderate interest, introduces the very inconvenience which it seems meant to remedy. The necessity of individuals will make borrowing unavoidable. Without some profit allowed by law, there will be but few lenders: and those principally bad men, who will break through the law, and take a profit; and then will endeavour to indemnify themselves from the danger of the penalty, by making that profit exorbitant. A capital *distinction must, therefore, be made between a moderate and exorbitant profit; to the former of which we usually give the name of interest, to the latter the truly odious appellation of usury: the former is necessary in every civil state, if it were but to exclude the latter, which ought never to be tolerated in any well-regulated society. For, as the whole of this matter is well summed up by Grotius(*g*), “if the compensation allowed by law “ does not exceed the proportion of the hazard run, or the “ want felt, by the loan, its allowance is neither repugnant “ to the revealed nor the natural law: but if it exceeds “ those bounds, it is then oppressive usury; and though “ the municipal laws may give it impunity, they never can “ make it just.”

Circumstances
on which de-
pends the rate
of interest.

We see, that the exorbitance or moderation of interest, for money lent, depends upon two circumstances: the inconvenience of parting with it for the present, and the hazard of losing it entirely. The inconvenience to individual lenders can never be estimated by laws; the rate, therefore, of general interest must depend upon the usual or general inconvenience. This results entirely from the quantity of specie or current money in the kingdom: for, the more specie there is circulating in any nation, the greater superfluity there will be, beyond what is necessary to carry on the business of exchange and the common concerns of life. In every nation or public community, there is a certain quantity of money thus necessary; which a person well skilled in political arithmetic might perhaps calculate as

(*g*) De j. b. & p. 1. 2, c. 12, s. 22.

exactly, as a private banker can the demand for running cash in his own shop: all above this necessary quantity may be spared, or lent, without much inconvenience to the respective lenders; and the greater this national superfluity is, the more numerous will be the lenders, and the lower ought the rate of the national interest to be: but, where there is not enough circulating cash, or barely enough, to answer the ordinary uses of the public, interest will be proportionably high; for lenders will be but few, as few can submit to the inconvenience of lending.

*So, also, the hazard of an entire loss has its weight in the regulation of interest: hence, the better the security, the lower will the interest be; the rate of interest being generally in a compound *ratio*, formed out of the inconvenience, and the hazard. And as, if there were no inconvenience, there should be no interest but what is equivalent to the hazard, so, if there were no hazard, there ought to be no interest, save only what arises from the mere inconvenience of lending. Thus, if the quantity of specie in a nation be such, that the general inconvenience of lending for a year is computed to amount to *three per cent.*: a man that has money by him will perhaps lend it upon good personal security at *five per cent.* allowing two for the hazard run; he will lend it upon landed security or mortgage at *four per cent.*, the hazard being proportionably less; but he will lend it to the state, on the maintenance of which all his property depends, at *three per cent.*, the hazard being none at all. [* 457]

But sometimes the hazard may be greater than the rate of interest allowed by law will compensate (35). And this

(35) Public opinion seems to be coming round to, though it has not yet reached, the point of considering gold and silver exactly in the same light as any other articles of commerce. When common sense has succeeded in establishing this not very abstruse doctrine, of course it will be thought as absurd to fix a *maximum* price upon the use of money as upon any other commodity.

Since this note was first published, an imperfect advance has been made

towards the recognition of sound principles: by the stat. of 3 & 4 Gul. IV. c. 98, s. 7, it is enacted, that no person taking more than the rate of legal interest for the loan of money on any bill or note, not having more than three months to run, shall be subject to any penalty or forfeiture: nor shall the liability of any party to any such bill or note be affected by any statute in force for the prevention of usury. And by the statute of 5 & 6 Gul. IV. c. 41, it is enacted, that securities

gives rise to the practice of, 1. Bottomry, or *respondentia*. 2. Policies of insurance. 3. Annuities upon lives.

Of bottomry or
respondentia
bonds.

[* 458]

And first, *bottomry* (which originally arose from permitting the master (36) of a ship, in a foreign country, to hypothecate the ship in order to raise money to refit) is in the nature of a mortgage of a ship; when the owner takes up money to enable him to carry on his voyage, and pledges the keel or *bottom* of the ship (*partem pro toto*) as a security for the repayment. In which case it is understood, that, if the ship be lost (37), the lender loses also his whole money; but, if it returns in safety, then he shall receive back his principal, and also the premium or interest agreed upon, however it may exceed the legal rate of interest (38). And this is allowed to be a valid contract in all trading *nations, for the benefit of commerce, and by reason of the extraordinary hazard run by the lender (*h*). And in this case the ship and tackle, if brought home, are answerable (as well as the person of the borrower) for the money lent. But if the loan is not upon the vessel, but upon the goods and merchandise, which must necessarily be sold or exchanged in the course of the voyage, then only the borrower, personally, is bound to answer the contract; who therefore in this case is said to take up money at *respondentia*. These terms are also applied to contracts for the

(*h*) Moll. de Jur. Mar. 361; Malynes. lex Mercat. b. 1, c. 31; Bacon's

Essays, c. 41; Cro. Jac. 208; Bynkersh. Quæst. Jur. Privat. l. 3, c. 16.

shall not be totally void, because a higher interest than the statute of 12 Ann. authorises has been reserved thereon. See *post*, the note to p. 463.

(36) The account given by our author of the origin of bottomry and *respondentia* contracts, has been declared to be very doubtful by Lord Tenterden, who observes, that the practice of lending money upon maritime risks at a high premium, was well known to the Romans before the time of Justinian; yet in those titles of the digest and the code which expressly treat of this subject, no mention is made of contracts of this nature entered into by the *master* of a ship, in that

character. (Abbott on Shipping, part 2, ch. 3.)

(37) Nothing short of a *total* loss will discharge the borrower of money on bottomry. (*Thompson v. The Royal Exchange Assurance Company*, 1 Mau. & Sel. 31.)

(38) In every loan, the principal must be hazarded to a certain extent; namely, by the risk of the borrower's insolvency: but in bottomry bonds the principal is, on the face of the contract itself, put in hazard; and in such cases the lender may reserve more than 5*l.* *per cent.* interest, without incurring the (legal) guilt of usury. (*Morse v. Wilson*, 4 T. R. 356.)

repayment of money borrowed, not on the ship and goods only, but on the mere hazard of the voyage itself; when a man lends a merchant 1,000*l.* to be employed in a beneficial trade, with condition to be repaid with extraordinary interest, in case such a voyage be safely performed (*i*): which kind of agreement is sometimes called *fœnus nauticum*, and sometimes *usura maritima* (*j*). But, as this gave an opening for usurious and gaming contracts, especially upon long voyages, it was enacted by the statute 19 Geo. II. c. 37, that all monies lent on bottomry or at *respondentia*, on vessels bound to or from the East Indies, shall be expressly lent only upon the ship or upon the merchandise; that the lender shall have the benefit of salvage (*k*); and that if the borrower hath not an interest in the ship, or in the effects on board, equal to the value of the sum borrowed, he shall be responsible to the lender for so much of the principal as hath not been laid out, with legal interest and all other charges, though the ship and merchandise be totally lost (39).

Secondly, a policy of *insurance* is a contract between A. and B., that upon A.'s paying a premium equivalent to the hazard run, B. will indemnify or insure him against a particular event. This is founded upon one of the same principles as the doctrine of interest upon loans, that of hazard; but not that of inconvenience. For, if I insure a ship to the Levant, and back again, at *five per cent.*; here I calculate the chance that she performs her voyage, to be twenty

Of policies of insurance.

On ships.

(*i*) 1 Sid. 27.

(*j*) Molloy, *ibid.*; Malyne, *ibid.*

(*k*) See Vol. I. page 294.

(39) Mr. Christian observes, that "a *respondentia* lender may be considered as a material partner in the loss and gain of the adventure; and therefore he may insure his interest in the success of the voyage; but it must be expressly specified in the policy to be *respondentia* interest, (3 Burr. 1394,) unless there is a particular usage to the contrary. (Park, Ins. 11.) A lender upon *respondentia* is not obliged to pay salvage or average losses, but he is entitled to receive the whole sum

advanced, provided the ship and cargo arrive at the port of destination; nor will he lose the benefit of the bond, if an accident happens by the default of the borrower or the captain of the ship. (Ib. 421.)" [But Mr. Serjeant Marshall, in the 6th ch. of the 2nd book of his Law of Insur. contends, that by the general law of merchants, the lender upon bottomry or *respondentia* contracts is liable to *general*, though not to *particular* average.—ED.]

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On lives.

to one against her being lost: and, if she be lost, I lose 100*l.* and get 5*l.* Now, this is much the same as if I lend the merchant, whose whole fortunes are embarked in this vessel, 100*l.* at* the rate of *eight per cent.* For, by a loan I should be immediately out of possession of my money, the inconvenience of which we have supposed equal to *three per cent.*: if, therefore, I had actually lent him 100*l.* I must have added 3*l.* on the score of inconvenience, to the 5*l.* allowed for the hazard, which together would have made 8*l.* But, as upon an insurance, I am never out of possession of my money till the loss actually happens, nothing is therein allowed upon the principle of inconvenience, but all upon the principle of hazard. Thus too, in a loan, if the chance of repayment depends upon the borrower's life, it is frequent (besides the usual rate of interest) for the borrower to have his life insured till the time of repayment; for which he is loaded with an additional premium, suited to his age and constitution. Thus, if Sempronius has only an annuity for his life, and would borrow 100*l.* of Titius for a year; the inconvenience and general hazard of this loan, we have seen, are equivalent to 5*l.*, which is, therefore, the legal interest: but there is also a special hazard in this case; for, if Sempronius dies within the year, Titius must lose the whole of his 100*l.* Suppose this chance to be as one to ten: it will follow that the extraordinary hazard is worth 10*l.* more, and, therefore, that the reasonable rate of interest in this case would be *fifteen per cent.* But this the law, to avoid abuses, will not permit to be taken; Sempronius, therefore, gives Titius, the lender, only 5*l.*, the legal interest; but applies to Gaius, an insurer, and gives him the other 10*l.* to indemnify Titius against the extraordinary hazard. And in this manner may any extraordinary or particular hazard be provided against, which the established rate of interest will not reach; that being calculated by the state to answer only the ordinary and general hazard, together with the lender's inconvenience in parting with his specie for the time. But, in order to prevent these insurances from being turned into a mischievous kind of gaming, it is enacted by statute 14 Geo. III. c. 48, that no insurance shall be made on lives, or on any other event, wherein the party insured hath no interest; that in all policies the name of such interested party shall

be *inserted ; and nothing more shall be recovered thereon than the amount of the interest of the insured.

This does not, however, extend to marine insurances, which were provided for by a prior law of their own. The learning relating to these insurances hath, of late years been greatly improved by a series of judicial decisions ; which have now established the law in such a variety of cases, that (if well and judiciously collected) they would form a very complete title in a code of commercial jurisprudence : but, being founded on equitable principles, which chiefly result from the special circumstances of the case, it is not easy to reduce them to any general heads in mere elementary institutes. Thus much, however, may be said ; that, being contracts, the very essence of which consists in observing the purest good faith and integrity, they are vacated by any the least shadow of fraud or undue concealment : and, on the other hand, being much for the benefit and extension of trade, by distributing the loss or gain among a number of adventurers, they are greatly encouraged and protected both by common law and acts of parliament (40). But, as a practice had obtained of insuring large sums without having any property on board, which are called insurances, *interest or no interest*, and also of insuring the same goods several times over ; both of which were a species of gaming, without any advantage to commerce, and were denominated *wagering policies* : it is, therefore, enacted by the stat. 19 Geo. II. c. 37, that all insurances, interest or no interest, or without farther proof of interest than the policy itself, or by way of gaming or wagering, or without benefit of salvage to the insurer (all which had the same pernicious tendency), shall be totally null and void, except upon privateers, or upon ships or merchandise from the Spanish and Portuguese dominions, for reasons sufficiently obvious ; and that no re-assurance shall be lawful, except the former insurer shall

Policies of insurance are vacated by the slightest fraud or undue concealment.

Wagering policies.

(40) Mr. Christian intimates, that "the contract of insurance is founded upon the purest principles of morality and abstract justice. Hence, it is necessary that the contracting parties should have perfectly equal knowledge or ignorance of every material circumstance respecting the thing insured.

If on either side there is any misrepresentation, or *allegatio falsi*, or concealment, or *suppressio veri*, which would in any degree affect the premium, or the terms of the engagement, the contract is fraudulent and absolutely void. See various instances in Park's Ins. c. x."

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be insolvent, a bankrupt, or dead: and lastly, that, in the East India trade, the lender of money on bottomry or at *respondentia*, shall alone have a right to be insured for the money lent, and the borrower *shall (in case of a loss) recover no more upon any insurance than the surplus of his property, above the value of his bottomry, or *respondentia* bond (41).

As to annuities
for lives.

Thirdly, the practice of purchasing *annuities for lives* at a certain price or premium, instead of advancing the same sum on an ordinary loan, arises usually from the inability of the borrower to give the lender a permanent security for the return of the money borrowed, at any one period of time. He therefore stipulates (in effect) to repay annually, during his life, some part of the money borrowed; together with legal interest for so much of the principal as annually remains unpaid, and an additional compensation for the extraordinary hazard run, of losing that principal entirely by the contingency of the borrower's death: all which considerations, being calculated and blended together, will constitute the just proportion or *quantum* of the annuity

(41) Mr. Christian observes, that "this statute does not extend to foreign ships, upon which, as before the statute, there may still be insurances, *interest or no interest*. These were not included in the act, on account of the difficulty of bringing witnesses from abroad to prove the interest. (Doug. 302.) But, where there is an interest on board, the owner by a *valued* policy, in which the value of the goods is agreed upon and fixed between the parties, may insure far beyond the extent of the real value. For the excess of the insurance is held not to be within the statute, unless it should appear that the interest is so small as to be a mere evasion of the act, and a pretence for gaming. In an open policy, where no value is fixed, the prime cost of the goods must be proved. (2 Burr. 1170.)

"Re-assurances are prohibited by the statute of 19 Geo. II. c. 37, both upon foreign and English ships, unless

the assurer is insolvent, a bankrupt, or dead; in which cases he, his assignee, or personal representative, may make a re-assurance, which must be expressly mentioned as a re-assurance in the policy. (2 T. R. 161.)

"A double insurance is where the owner insures his goods twice or *several times over*, with different underwriters, which he may lawfully do; and though he cannot recover more than a single satisfaction for his loss, yet he may bring his action against any one of the underwriters, and compel him to pay the whole extent of the interest insured. And this underwriter may afterwards recover from each of the rest, a rateable satisfaction or apportionment of the sum which he has been obliged to pay to the assured. (Park, Ins. 280.) The law of insurance is fully and ably collected and arranged by Mr. Justice Park, in his *System of the Law of Marine Insurances*."

which ought to be granted. The real value of that contingency must depend on the age, constitution, situation, and conduct of the borrower; and therefore the price of such annuities cannot, without the utmost difficulty, be reduced to any general rules. So that if, by the terms of the contract, the lender's principal is *bonâ fide* (and not colourably)(*l*) put in jeopardy, no inequality of price will make it an usurious bargain; though, under some circumstances of imposition, it may be relieved against in equity. To throw, however, some check upon improvident transactions of this kind, which are usually carried on with great privacy, the statute 17 Geo. III. c. 26, has directed, that, upon the sale of any life annuity of more than the value of ten pounds *per annum* (unless on a sufficient pledge of lands in fee-simple or stock in the public funds) the true consideration, which shall be in money only, shall be set forth and described in the security itself; and a memorial of the date of the security, of the names of the parties, *cestui que trusts*, *cestui que vies*, and witnesses, and of the consideration money, shall, within twenty days after its execution, be inrolled in the court of Chancery; else the security shall be null and void(42); and in case of collusive practices respecting the consideration, the *court in which any action is brought or judgment obtained upon such collusive security, may order the same to be cancelled, and the judgment (if any) to be vacated: and also all contracts for the purchase of annuities from infants shall remain utterly void, and be incapable of confirmation after such infants arrive to the age of maturity. But to return to the doctrine of common interest on loans.

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Upon the two principles of inconvenience and hazard, compared together, different nations have, at different times, established different rates of interest. The Romans at one time allowed *centesimæ*, one per cent. monthly, or *twelve per cent. per annum*, to be taken for common loans; but Justi-

Rates of interest
allowed by the
Romans;

(*l*) Carth. 67.

(42) The statute cited in the text was repealed by the statute of 53 Geo. III. c. 141, which last-named act was explained by the subsequent one, of 3 Geo. IV. c. 92, and lastly by that of

7 Geo. IV. c. 75: by these three acts the inrolments and forms of attestation of annuity instruments are now regulated.

by the Dutch;

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nian (*m*) reduced it to *trientes*, or one third of the *as* or *centesimæ*, that is, *four per cent.*; but allowed higher interest to be taken of merchants, because there the hazard was greater. So, too, Grotius informs us (*n*), that, in Holland, the rate of interest was then eight *per cent.* in common loans, but twelve to merchants. And Lord Bacon was desirous of introducing a similar policy in England (*o*):

(*m*) Cod. 4. 32. 26; Nov. 33, 34, 35.—A short explication of these terms, and of the division of the Roman *as*, will be useful to the student, not only for understanding the civi-

lians, but also the more classical writers, who perpetually refer to this distribution. Thus Horace, *ad Pisones*, 325.

Romani pueri longis rationibus assem

Discunt in partes centum diducere. Dicat

Filius Albini, si de quincunce remota est

Uncia, quid superet? poterat dixisse, triens: eu,

Rem poteris servare tuam! redit uncia, quid fit?

Semis.——

It is, therefore, to be observed, that, in calculating the rate of interest, the Romans divided the principal sum into an *hundred* parts; one of which they allowed to be taken monthly; and this, which was the highest rate of interest permitted, they called *usura centesimæ*, amounting yearly to twelve *per cent.* Now as the *as*, or Roman pound, was commonly used to express any integral sum, and was divisible into twelve parts or *uncia*, therefore these twelve monthly payments or *uncia* were held to amount annually to one pound, or *as usurarius*; and so the *usura asses* were synonymous to the *usura centesimæ*. And all lower

rates of interest were denominated according to the relation they bore to this centesimal usury, or *usura asses*: for the several multiples of the *uncia*, or duodecimal parts of the *as*, were known by different names according to their different combinations; *sextans*, *quadrans*, *triens*, *quincunx*, *semiss*, *septunx*, *bes*, *dodrans*, *dextans*, *deunx*, containing respectively, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, *uncia*, or duodecimal parts of an *as*. (Ff. 28. 5. 50, s. 2; Gravin. Orig. Jur. Civ. l. 2, s. 47.) This being premised, the following table will clearly exhibit at once the subdivisions of the *as*, and the denominations of the rate of interest.

USURÆ.	PARTES ASSIS.	PER ANNUM.
<i>Asses, sive centesimæ</i>	<i>integer</i>	12 <i>per cent.</i>
<i>Deunces</i>	$\frac{11}{12}$	11
<i>Dextances, vel decunces</i> ..	$\frac{5}{6}$	10
<i>Dodrantes</i>	$\frac{3}{4}$	9
<i>Besses</i>	$\frac{2}{3}$	8
<i>Septunces</i>	$\frac{7}{12}$	7
<i>Semisses</i>	$\frac{1}{2}$	6
<i>Quincunces</i>	$\frac{5}{12}$	5
<i>Trientes</i>	$\frac{1}{3}$	4
<i>Quadrantes</i>	$\frac{1}{4}$	3
<i>Sextances</i>	$\frac{1}{6}$	2
<i>Unciæ</i>	$\frac{1}{12}$	1

(*n*) De jur. b. & p. 2. 12. 22.

(*o*) Essays, c. 41.

but our law establishes one standard for all alike, where by our law. the pledge or security itself is not put in jeopardy; lest, under the general pretence of vague and indeterminate hazards, a door should be opened to fraud and usury: leaving specific hazards to be provided against by specific insurances, by annuities for lives, or by loans upon *respondentia*, or bottomry. But, as to the rate of legal interest, it has varied and decreased for two hundred years past, according as the quantity of specie in the kingdom has increased by accessions of trade, the introduction of paper credit, and other circumstances. The statute 37 Hen. VIII. c. 9, confined interest to ten *per cent.*, and so did the statute 13 Eliz. c. 8. But, as, through the encouragements given in her reign to commerce, the nation grew more wealthy, so, under her successor, the statute 21 Jac. I. c. 17, reduced it to eight *per cent.*; as did the statute 12 Car. II. c. 13, to six: and lastly, by the statute 12 Ann. st. 2, c. 16, it was brought down to five *per cent.* yearly, which is now the extremity of legal interest that can be taken (43). But, yet, if a contract If a contract carrying interest

(43) Mr. Christian observes, that “this statute not only makes the lender liable to a penalty of treble the amount of the sum lent, but, it declares all usurious bonds, contracts, and assurances, absolutely void.”

[But, the statute of 5 & 6 Gul. IV. c. 41, enacts, that such securities shall not be totally void, but shall be deemed to have been made for an illegal consideration; the parties, therefore, to whom such securities were given cannot enforce them; but, in the hands of innocent and *bonâ fide* holders for good consideration, they may be available. And this, indeed, was previously provided for by the statute of 58 Geo. III. c. 93, cited *infra*. And see *ante*, the note to p. 457.

[Though an instrument might, before the late acts, be totally void at law, as being grounded on an usurious contract; (*Roberts v. Goff*, 4 Barn. & Ald. 92;) a court of equity will not even give a discovery, unless on terms of having the money actually advanced, refunded. (*Duke of Bolton v. Wil-*

liams, 2 Ves. jun. 151; *Dalbiac v. Dalbiac*, 16 Ves. 124; *Mason v. Gardiner*, 4 Br. 438.) And at law, if an annuity deed is set aside, and a judgment entered up thereon is vacated for irregularity, still the grantee of the annuity may recover back the consideration money, by an action of *assumpsit*, or for money had and received. (*Scurfield v. Gowland*, 6 East, 241; *Hicks v. Hicks*, 3 East, 16; *Shove v. Webb*, 1 T. R. 755; and see *Williamson v. Gould*, 1 Bing. 241.) To the generality of the *dictum*, to be found in several of the cases already cited, that equity considers the holder of an usurious instrument as a creditor for the sum actually advanced by, and fairly due to him, an exception must be made in cases where the debtor becomes bankrupt; there, the security (if not a negotiable one, and actually in the hands of an indorsee for valuable consideration without notice) is cut down altogether. (*Ex parte Skip*, 2 Ves. sen. 489; *Benfield v. Solomons*, 9 Ves. 84; *Ex parte Scri-*

be made in a foreign country, interest is calculated according to the law of that country.

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which carries interest be made in a foreign country, our courts will direct the payment of interest according to the law of that country in which the contract was made(*p*). Thus, Irish, American, Turkish, and Indian interest, have *been allowed in our courts to the amount of even twelve *per cent.*: for the moderation or exorbitance of interest depends upon local circumstances; and the refusal to enforce such contracts would put a stop to all foreign trade. And, by statute 14 Geo. III. c. 79, all mortgages and other securities upon estates, or other property in Ireland, or the plantations, bearing interest not exceeding six *per cent.* shall be legal; though executed in the kingdom of Great Britain: unless the money lent shall be known at the time to exceed the value of the thing in pledge; in which case also, to prevent usurious contracts at home under colour of such foreign securities, the borrower shall forfeit treble the sum so borrowed.

Debt—a contract whereby a determinate sum of money becomes due to any person.

4. The last general species of contracts, which I have to mention, is that of *debt*; whereby a *chose* in action, or right to a certain sum of money, is mutually acquired and lost(*q*). This may be the counterpart of, and arise from, any of the other species of contracts. As, in case of a sale, where the price is not paid in ready money, the vendee becomes indebted to the vendor for the sum agreed on: and the vendor has a property in this price, as a *chose* in action, by means of this contract of debt. In bailment, if the bailee loses or detains a sum of money bailed to him for any special purpose, he becomes indebted to the bailor in the same numerical sum, upon his implied contract, that he should execute the trust reposed in him, or repay the money to the bailor. Upon hiring or borrowing, the hirer or borrower, at the same time that he acquires a property in the thing lent, may also become indebted to the lender, upon his contract to restore the money borrowed, to pay the price or premium of the loan, the hire of the horse, or the like.

(*p*) 1 Equ. Cas. Abr. 289; 1 P. Wms. 395.

(*q*) F. N. B. 119.

vener, 3 Ves. & Bea. 14.) But the statute of 58 Geo. III. c. 93, in order to afford relief to *bond fide* holders of negotiable securities, without notice

that they were given for usurious considerations, enacts that, in such hands, the securities shall not be void.—ED.]

Any contract in short whereby a determinate sum of money becomes due to any person, and is not paid, but remains in action merely, is a contract of debt. And, taken in this light, it comprehends a great variety of *acquisition; being [*465] usually divided into debts of *record*, debts by *special*, and debts by *simple* contract.

A debt of *record* is a sum of money which appears to be due by the evidence of a court of record. Thus, when any specific sum is adjudged to be due from the defendant to the plaintiff, on an action or suit at law: this is a contract of the highest nature, being established by the sentence of a court of judicature. Debts upon recognizance are also a sum of money, recognized or acknowledged to be due to the crown or a subject, in the presence of some court or magistrate, with a condition that such acknowledgment shall be void upon the appearance of the party, his good behaviour, or the like: and these, together with statutes-merchant and statutes-staple, &c., if forfeited by non-performance of the condition, are also ranked among this first and principal class of debts, *viz.* debts of record; since the contract on which they are founded is witnessed by the highest kind of evidence, *viz.* by matter of record.

Debts by *specialty*, or special contract, are such whereby a sum of money becomes, or is acknowledged to be, due by deed or instrument under seal. Such as, by deed of covenant, by deed of sale, by lease reserving rent, or by bond or obligation: which last we took occasion to explain in the twentieth chapter of the present book; and then showed that it is a creation or acknowledgment of a debt from the obligor to the obligee, unless the obligor performs a condition thereunto usually annexed, as the payment of rent or money borrowed, the observance of a covenant, and the like; on failure of which the bond becomes forfeited and the debt becomes due in law. These are looked upon as the next class of debts after those of record, being confirmed by special evidence, under seal.

Debts by *simple contract* are such, where the contract upon which the obligation arises is neither ascertained by matter of record, nor yet by deed or special instrument, but by mere oral evidence, the most simple of any; or by notes *unsealed, which are capable of a more easy proof, and (therefore only) better than a verbal promise. It is easy to see into what a vast variety of obligations this last class

Debts of record;

by specialty;

by simple contract.

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may be branched out, through the numerous contracts for money, which are not only expressed by the parties, but virtually implied in law. Some of these we have already occasionally hinted at; and the rest, to avoid repetition, must be referred to those particular heads in the third book of these commentaries, where the breach of such contracts will be considered. I shall only observe at present, that, by the statute 29 Car. II. c. 3, no executor or administrator shall be charged upon any special promise to answer damages out of his own estate, and no person shall be charged upon any promise to answer for the debt or default of another, or upon any agreement in consideration of marriage, or upon any contract or sale of any real estate, or upon any agreement that is not to be performed within one year from the making; unless the agreement, or some memorandum thereof, be in writing, and signed by the party himself, or by his authority.

But there is one species of debts upon simple contract, which, being a transaction now introduced into all sorts of civil life, under the name of *paper credit*, deserves a more particular regard. These are debts by *bills of exchange*, and *promissory notes*.

Bills of exchange.

A bill of exchange is a security, originally invented among merchants in different countries, for the more easy remittance of money from the one to the other, which has since spread itself into almost all pecuniary transactions. It is an open letter of request from one man to another, desiring him to pay a sum named therein to a third person on his account; by which means a man at the most distant part of the world may have money remitted to him from any trading country. If A. lives in Jamaica, and owes B. who lives in England 1000*l.*, now if C. be going from England to Jamaica, he may pay B. this 1000*l.*, and take a bill of exchange drawn by B. in England upon A. in Jamaica, and receive it when he comes thither. Thus does B. receive his debt, at any distance of place, by transferring it to C.; who carries over his money *in paper credit, without danger of robbery or loss. This method is said to have been brought into general use by the Jews and Lombards, when banished for their usury and other vices; in order the more easily to draw their effects out of France and England, into those countries in which they had chosen to reside. But the invention of it was a little earlier: for the Jews were banished out of

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Guienne in 1287, and out of England in 1290 (*r*); and in 1236 the use of paper credit was introduced into the Mogul empire in China (*s*). In common speech, such a bill is frequently called a *draft*, but a *bill of exchange* is the more legal as well as mercantile expression. The person, however, who writes this letter, is called in law the *drawer*, and he to whom it is written the *drawee*; and the third person, or negotiator, to whom it is payable (whether specially named, or the *bearer* generally) is called the *payee*.

These bills are either *foreign*, or *inland*; *foreign*, when Foreign. drawn by a merchant residing abroad upon his correspondent in England, or *vice versâ*; and *inland*, when both the Inland. drawer and the drawee reside within the kingdom. Formerly foreign bills of exchange were much more regarded in the eye of the law than inland ones, as being thought of more public concern in the advancement of trade and commerce. But now, by two statutes, the one 9 & 10 W. III. c. 17, the other 3 & 4 Ann. c. 9 (44), inland bills of exchange are put upon the same footing as foreign ones; what was the law and custom of merchants with regard to the one, and taken notice of merely as such (*t*), being by those statutes expressly enacted with regard to the other. So that now there is not in law any manner of difference between them (45).

(*r*) 2 Carte. Hist. Eng. 203, 206.

(*s*) Mod. Un. Hist. iv. 499.

(*t*) 1 Roll. Abr. 6.

(44) The acts, which at first were temporary, were made perpetual by 7 Ann. c. 25.

(45) Mr. Christian observes, that "one very important distinction between foreign and inland bills of exchange still remains unaltered by the statutes; *viz.* in a foreign bill, in order to recover against the drawer or indorsers, it is necessary that the bill should be protested for non-acceptance or non-payment; (5 T. R. 239;) but a protest is not necessary upon an inland bill, to enable the holder to recover the amount of it against the drawer or indorsers; and the only advantage of a protest upon an inland bill is to give the holder a right to recover interest and expenses incurred

by the non-acceptance or non-payment. (Ld. Raym. 993.) No inland bill, payable at or after sight, can be protested; or which is not drawn payable at some time after date. (4 T. R. 170.)"

[In *Windle v. Andrews*, (2 Barn. & Ald. 701,) it was decided, that, although the indorsee of an inland bill of exchange has no remedy for interest under the statute of Ann., unless the bill has been regularly protested; still, that statute does not take away any remedy which the holder of a bill of exchange had previously; and the drawer of a bill of exchange, which is not duly paid, is liable at common law for interest, although no protest was made.—Ed.]

Promissory
notes.

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Promissory notes, or notes of hand, are a plain and direct engagement in writing, to pay a sum specified at the time therein limited to a person therein named, or sometimes to his order, or often to the bearer at large. These also, by the same statute 3 & 4 Ann. c. 9, are made assignable and indorsable in like manner as bills of exchange (46). But, by statute 15 Geo. III. c. 51, all promissory or other notes, *bills of exchange, drafts, and undertakings in writing, being negotiable or transferable, for the payment of less than twenty shillings, are declared to be null and void; and it is made penal to utter or publish any such; they being deemed prejudicial to trade and public credit. And, by 17 Geo. III. c. 30 (47), all such notes, bills, drafts, and undertakings, to the amount of twenty shillings, and less than five pounds, are subjected to many other regulations and formalities; the omission of any one of which vacates the security, and is penal to him that utters it.

The property in
both bills and
notes is vested in
the payee.

The payee, we may observe, either of a bill of exchange or promissory note, has clearly a property vested in him (not indeed in possession but in action) by the *express* contract of the drawer in the case of a promissory note, and, in the case of a bill of exchange, by his *implied* contract, *viz.* that, provided the drawee does not pay the bill, the drawer will: for which reason it is usual, in bills of exchange, to express that the *value* thereof hath been *received* by the drawer (*u*); in order to show the consideration, upon which the implied contract of repayment arises. And this property, so vested, may be transferred and assigned from the payee to any other man; contrary to the general rule of the common law, that no *chose* in action is assignable; which assignment is the life of paper credit. It may, therefore, be of some use, to mention a few of the principal incidents attending this transfer or assignment, in order to make it regular, and thereby to charge the drawer with the payment of the debt to other persons than those with whom he originally contracted.

As to the mode
of assigning bills
and notes.

In the first place then, the payee, or person to whom or whose *order* such bill of exchange or promissory note is pay-

(*u*) Stra. 1212.

(46) Vol. III. p. 157.

(47) By the statute of 7 Geo. IV. c. 6, the issuing of promissory notes

for any sum under 5*l.* is prohibited, under a penalty of 20*l.* for every such note issued.

able, may, by indorsement, or writing his name *in dorso*, or on the back of it, assign over his whole property to the bearer, or else to another person by name, either of whom is then called the indorsee; and he may assign the same to another, and so on *in infinitum*. And a promissory note, payable to A. or *bearer*, is negotiable without any indorsement, and payment thereof may be demanded by any bearer ^[* 469] of it (*v*). But, in case of a bill of exchange, the payee, or the indorsee (whether it be a general or particular indorsement), is to go to the drawee, and offer his bill for acceptance; which acceptance (so as to charge the drawer with costs) must be in writing, under or on the back of the bill. If the drawee accepts the bill, either verbally (48) or in writing (*w*), he then makes himself liable to pay it; this being now a contract on his side, grounded on an acknowledgment that the drawer has effects in his hands, or at least credit sufficient to warrant the payment. If the drawee refuses to accept the bill, and it be of the value of 20*l.* or upwards, and expressed to be for value received, the payee or indorsee may protest it for *non-acceptance*; which protest must be made in writing, under a copy of such bill of exchange, by some notary public; or, if no such notary be resident in the place, then by any other substantial inhabitant in the presence of two credible witnesses; and notice of such protest must, within fourteen days after, be given to the drawer (49).

Acceptance of bill.

Protest for non-acceptance.

(*v*) 2 Show. 235.—*Grant v. Vaughan*, T. 4 Geo. III. B. R.

(*w*) Stra. 1000.

(48) The statute of 1 & 2 Geo. IV. c. 78, enacts, that no acceptance of any *inland* bill shall be sufficient to charge any person, unless such acceptance be in writing on the bill, or on one of its parts when drawn in sets. But a parol acceptance of a *foreign* bill of exchange is still valid. (*Fairlee v. Herring*, 3 Bingh. 625; *S. C.* 11 Moore, 520.) The same statute enacts, that acceptance of any bill of exchange, payable at a specified place, without further expression qualifying the acceptance, shall be deemed to all intents and purposes a *general* acceptance; (therefore, in such case, the holder is not bound to present the bill at any particular time

or place; *Turner v. Hayden*, 4 Barn. & Cress. 3; *S. C.* 6 D & R. 5;) but if the acceptance express that the bill is accepted, payable at a specified place only, *and not otherwise or elsewhere*, such acceptance shall be deemed to all intents and purposes a *qualified* acceptance of the bill, and the acceptor shall not be liable to pay the said bill, except in default of payment, when such payment shall have been first duly demanded at the place specified.

(49) The ground upon which the drawer of a bill of exchange is discharged from liability to the holder in respect thereof, if he has not received due notice of its dishonour, is, that the

Protest for non-payment.

But, in case such bill be accepted by the drawee, and after acceptance he fails or refuses to pay it within three

holder, omitting to send such notice to the drawer, must be presumed to have given credit to some person liable as between him and the drawer: and it has been held, (in *Ex parte Barclay*, 7 Ves. 598, in *Staples v. Okines*, 1 Esp. N. P. C. 333, and in *Stewart v. Kennet*, 2 Camp. 177,) that notice of the dishonour of a bill should be given by the holder himself or his authorised agent, otherwise the drawer would be discharged: but in later cases, at law, it has been decided, that it is sufficient for an indorsee to prove that the drawer of a bill had notice of its dishonour from the acceptor, or any party to the bill: (*Rosher v. Kiernan*, 4 Camp. 87; *Wilson v. Swabey*, 1 Stark. 34; *Chapman v. Keane*, 3 Adol. & Ellis, 197; *S. C.* 4 Nev. & M. 607:) and likewise, that if the indorser of a bill receive notice of its dishonour from any person who is a party to the bill, he is directly liable upon it to a subsequent indorsee, although he had no notice of the dishonour from such subsequent indorsee. (*Jameson v. Swinton*, 2 Camp. 373.) It seems, also, that want of notice to a drawer, of the dishonour of one of his bills of exchange, may be supplied by evidence of his acknowledgment to the holder when asked if the bill would be paid, that "it would not:" (*Brett v. Levett*, 13 East, 214; and see *infra*:) but such an acknowledgment, made by the drawer after he has committed an act of bankruptcy, is inadmissible as evidence, in an action by his assignees, to prove the petitioning creditor's debt, in order to support the commission. (*Smallcombe v. Bruges*, 1 M'Clel. 60.) And the necessity of notice is not dispensed with by any understanding which existed between the parties; for, evidence of such an understanding can never be admitted to vary the legal operation of an instrument: (*Free v. Hawkins*, 8 Taunt. 97;

S. C. 1 Moore, 535:) nor, will mere knowledge of the dishonour of a bill, (such knowledge not being derived from any party to the bill, or person who would have a right of action thereon, if returned to him,) be equivalent to notice from the holder, or other party thereto, for the purpose of fixing the person who has acquired such casual knowledge of the fact with responsibility, for, unless such notice be received, it may be supposed that the holder intends to give credit to some other party. (*Esdaile v. Sowerby*, 11 East, 116; *Tindal v. Brown*, 1 T. R. 169.) Even when the drawer of a bill of exchange has become bankrupt, and absconded before it was due, and the acceptor also has become bankrupt before the bill was due; the holder will not be entitled to prove the bill under the commission against the drawer, unless notice of the dishonour of the bill has been duly given to the assignees of the said drawer; at all events when the bankrupt drawer's house was open, and a notice left there would have reached his assignees. (*Rohde v. Proctor*, 4 Barn. & Cress. 524; *S. C.* 6 D. & R. 616.) If, indeed, the bill had been dishonoured before assignees of the drawer's estate were chosen, notice to the drawer himself would be sufficient. (*Ex parte Moline*, 19 Ves. 217.)

There are certain excepted cases, in which notice of the dishonour of a bill of exchange has been determined not to be necessary: for instance, (as was before intimated,) where the drawer has no effects in the hands of the drawee, nor any right upon any other ground to expect the bill will be paid, he is held not to be entitled to formal notice of its dishonour; knowledge being, in such case substituted for notice: but the decisions establishing this and similar exceptions have been frequently regretted by courts both of law and

days after it becomes due (50) (which three days are called days of grace), the payee or indorsee is then to get it protested for *non-payment*, in the same manner, and by the same persons who are to protest it in case of non-acceptance, and such protest must also be notified, within fourteen days after, to the drawer. And he, on producing such protest, either of non-acceptance, or non-payment, is bound to make good to the payee, or indorsee, not only the amount of the said bills (which he is bound to do within a reasonable time after non-payment, without any protest, by the rules of the common law (x),) but also interest and all charges, to be computed from the time of making such protest. But if no protest be made or notified to the drawer, and any damage accrues by such neglect, it shall fall on the holder of the bill. The bill, when refused, must be demanded of the drawer as soon as conveniently may be: for though, when one draws a bill of *exchange, he subjects himself to the payment, if the person on whom it is drawn refuses either to accept or pay, yet that is with this limitation, that if the bill be not paid, when due, the person to whom it is payable, shall in convenient time give the drawer notice

Consequences of the neglect of the holder to protest, or to give notice of the dishonour.

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(x) Lord Raym. 993.

equity, as tending to introduce nice distinctions, instead of adhering to a plain and intelligible rule. (*Cory v. Scott*, 3 Barn. & Ald. 622; *Claridge v. Dalton*, 4 Mau. & Sel. 231; *Wallwyn v. St. Quintin*, 1 Bos. & Pull. 655; *Mawson v. Stock*, 6 Ves. 305; *Ex parte Wilson*, 11 Ves. 411; *Ex parte Heath*, 2 Ves. & Bea. 240.)

(50) Mr. Christian observes, that "a bill or note is not now considered due or demandable till the last day of the three days' grace; as, if a bill or note is dated on the 12th of any month, and made payable ten days, one week, or one month, after date, payment must be demanded on the 25th, the 22d, of the same, and on the 15th of the next month respectively. But, if the third day of grace falls on a Sunday, the bill or note is payable and due on the Saturday preceding; and by 39 & 40 Geo. III. c. 42, if payable

on Good Friday, they are due the day before. Days of grace are allowed upon promissory notes, in like manner as upon bills of exchange. (4 T. R. 148.)

"A promissory note made payable to A., without adding *or to his order*, or *to bearer*, though not negotiable, is a note within the statute, and the three days of grace must be allowed upon it. (6 T. R. 123.)

"A bill or note must be drawn upon a proper stamp, and if it be drawn upon a greater stamp than the statutes require, it cannot be received in evidence; but the plaintiff may recover as for so much money lent or advanced, if he can prove the defendant's promise to pay, or the consideration received by him from the plaintiff, independently of the imperfect note. (1 East, 55.)"

[But, as to this last point, a ra-

thereof; for, otherwise, the law will imply it paid: since it would be prejudicial to commerce, if a bill might rise up to charge the drawer at any distance of time: when in the mean time all reckonings and accounts may be adjusted between the drawer and the drawee (y) (51).

Each indorsee may, on default of the acceptor, or drawee, resort to all or any of the prior indorsers for payment of the bill;

If the bill be an indorsed bill, and the indorsee cannot get the drawee to discharge it, he may call upon either the drawer or the indorser, or if the bill has been negotiated through many hands, upon any of the indorsers; for each indorser is a warrantor for the payment of the bill, which is frequently taken in payment as much (or more) upon the credit of the indorser, as of the drawer. And if such indorser, so called upon, has the names of one or more indorsers prior to his own, to each of whom he is properly an indorsee, he is also at liberty to call upon any of them to make him satisfaction; and so upwards. But the first indorser has nobody to resort to, but the drawer only (52).

(y) Salk. 127.

tional alteration of the law has been enacted by the stat. of 55 Geo. III. c. 184, s. 10. If a stamp is of sufficient amount, the instrument is not now invalid merely because a higher rate of duty than was necessary has been paid. See *Green v. Davies*, 4 Barn. & Cress. 240; *S. C.* 6 D. & R. 311.—ED.]

(51) Notice of the non-acceptance of a bill must be sent or given to the parties to whom the holder or indorsee means to resort within a *reasonable* time after the dishonour of the bill: but, it has been much disputed, whether it is the province of the court or of the jury to decide what is a reasonable time for this purpose: it seems, however, now to be understood that this is a question partly of fact and partly of law; and, that the jury are to find the facts, such as the distance from each other at which the parties live, the course of the post, &c.; but, when those facts are established, the reasonableness of the time becomes a question of law, and consequently is to be determined by the

court, and not by the jury. (*Tindal v. Brown*, 1 T. R. 168; *Darbishire v. Parker*, 6 East, 10; *Haynes v. Birks*, 3 Bos. & Pul. 601; *Bateman v. Joseph*, 12 East, 434; *Baldwin v. Richardson*, 1 Barn. & Cress. 247; *S. C.* 2 D. & R. 287; *Sturges v. Derrick*, Wightw. 76; *Langdale v. Trimmer*, 15 East, 292.) As a general rule, however, the day following that in which the holder of a bill receives the intelligence of its dishonour, is the time at which he ought to give notice to the parties whom he intends to hold responsible. (*Bray v. Hadwen*, 5 Mau. & Sel. 70; *Williams v. Smith*, 2 Barn. & Ald. 500.)

(52) Mr. Christian observes, that “the holder of the bill may bring actions against the acceptor, drawer, and all the indorsers at the same time; but though he may obtain judgments in all the actions, yet he can recover but one satisfaction for the value of the bill; but he may sue out execution against all the rest for the costs of their respective actions. (*Bayley*, 43.)”

What has been said of bills of exchange is applicable also to promissory notes, that are indorsed over, and negotiated from one hand to another; only that, in this case, as there is no drawee, there can be no protest for non-acceptance; or rather the law considers a promissory note in the light of a bill drawn by a man upon himself, and accepted at the time of drawing. And, in case of non-payment by the drawer, the several indorsees of a promissory note have the same remedy, as upon bills of exchange against the prior indorsers.

or of a promissory note, on default of the maker.

CHAPTER XXXI.

OF TITLE BY BANKRUPTCY (1).

THE preceding chapter having treated pretty largely of the acquisition of personal property by several commercial methods, we from thence shall be easily led to take into our present consideration a tenth method of transferring property, which is that of

X. By bankruptcy.

X. Bankruptcy; a title which we before lightly touched upon (a), so far as it related to the transfer of the real estate of the bankrupt (2). At present we are to treat of it more minutely, as it principally relates to the disposition of chattels, in which the property of persons concerned in trade more usually consists, than in lands or tenements. Let us, therefore, first of all consider, 1. *Who* may become a bankrupt: 2. What *acts* make a bankrupt: 3. The *proceedings* on a commission of bankrupt: and 4. In what manner an estate in goods and chattels may be *transferred* by bankruptcy.

1. Who may become a bankrupt.

1. Who may become a bankrupt. A bankrupt was before (b) defined to be "a trader, who secretes himself, or "does certain other acts, tending to defraud his creditors." He was formerly considered merely in the light of a crimi-

(a) See pag. 285.

(b) Ibid.

(1) By the statute of 1 & 2 Gul. IV. c. 56, the duty of administering and distributing the estate and effects of bankrupts, was transferred to a court specially created for that purpose; from the decisions of which court an appeal lies to the Lord Chancellor on

matters of law and equity, or on the refusal or admission of evidence.

(2) See *ante*, the note to chap. 18, p. 286, a summary of the statutory provisions at present affecting the real estates of bankrupts.

nal (3) or offender(c) (4); and in this spirit we are told by Sir Edward Coke(d), that we have fetched as well the name, as the wickedness *of bankrupts from foreign nations (e). [* 472] But at present the laws of bankruptcy are considered as laws calculated for the benefit of trade, and founded on the principles of humanity as well as justice; and to that end they confer some privileges, not only on the creditors, but also on the bankrupt or debtor himself. On the creditors, by compelling the bankrupt to give up all his effects to their use, without any fraudulent concealment: on the debtor, by exempting him from the rigour of the general law, whereby his person might be confined at the discretion of his creditor, though in reality he has nothing to satisfy the debt: whereas the law of bankrupts, taking into consideration the sudden and unavoidable accidents to which men in trade are liable, has given them the liberty of their persons, and some pecuniary emoluments, upon condition they surrender up their whole estate to be divided among their creditors (5).

(c) Stat. 1 Jac. I. c. 15, s. 17.

(d) 4 Inst. 277.

(e) The word itself is derived from the word *bancus* or *banque*, which signifies the table or counter of a tradesman, (Dufresne, I. 969,) and *ruptus*, broken; denoting thereby one whose shop or place of trade is broken and gone; though others rather choose to adopt the word *route*, which in French

signifies a trace or track, and tell us that a bankrupt is one who hath removed his *banque*, leaving but a trace behind. (4 Inst. 277.) And it is observable that the title of the first English statute concerning this offence, 34 Hen. VIII. c. 4, "against such persons as do make bankrupt," is a literal translation of the French idiom, *qui font banque route*.

(3) See Vol. IV. p. 155.

(4) Mr. Christian observes, that "throughout the three first statutes the bankrupt is uniformly called an offender, and the original design of the bankrupt law appears to have been to prevent and defeat the frauds of criminal debtors."

(5) At this time of day, it would be considered a very harsh application of the term, to speak of every bankrupt as a *criminal*. (*Ex parte Stoke*, 7 Ves. 407.) A bankrupt, by fraudulent concealment of his effects, may still bring upon himself, most deservedly, the heaviest infliction of the law, short of

the punishment of death: (Stat. 6 Geo. IV. c. 16, s. 112:) but, by honestly giving up the whole of his effects to his creditors, he may, according to the present mild administration of justice, actually entitle himself to privileges, which debtors who are not liable to the bankrupt laws cannot claim. For instance, he is, by virtue of a certificate fairly obtained, exempted, with regard to all debts which might have been proved under the commission against him, from prolonged imprisonment: (see the 121st section of the statute just cited:) and an honest bankrupt may even, (in

The Roman law
on this subject.

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In this respect our legislature seems to have attended to the example of the Roman law. I mean not the terrible law of the twelve tables; whereby the creditors might cut the debtor's body into pieces, and each of them take his proportionable share: if, indeed, that law, *de debitore in partes secando*, is to be understood in so very butcherly a light; which many learned men have with reason doubted (*f*). Nor do I mean those less inhuman laws (if they may be called so, as *their* meaning is indisputably certain), of imprisoning the debtor's person in chains; subjecting him to stripes and hard labour, at the mercy of his rigid creditor; and sometimes selling him, his wife, and children, to perpetual foreign slavery *trans Tiberim* (*g*): an oppression which produced so many *popular insurrections, and secessions to the *mons sacer*. But I mean the law of *cession*, introduced by the Christian emperors; whereby, if a debtor *ceded*, or yielded up all his fortune to his creditors, he was secured from being dragged to a gaol, "*omni quoque corporali cruciatu semoto*" (*h*). For, as the emperor justly observes (*i*), "*inhumanum erat spoliatum fortunæ suis in solidum damnari.*" Thus far was just and reasonable: but, as the departing from one extreme is apt to produce its opposite, we find it afterwards enacted (*k*), that, if the debtor by any unforeseen accident was reduced to low circumstances, and would *swear* that he had not sufficient left to pay his debts, he should not be compelled to cede or give up even that which he had in his possession: a law, which under a false notion of humanity, seems to be fertile of perjury, injustice, and absurdity.

(*f*) Taylor, Comment. in L. decemviral; Bynkersh. Observ. Jur. I. 1. Heinecc. Antiq. III. 30. 4.

(*g*) In Pegu and the adjacent countries in East India, the creditor is entitled to dispose of the debtor himself, and likewise of his wife and children; insomuch that he may even violate

with impunity the chastity of the debtor's wife, but then, by so doing, the debt is understood to be discharged. (Mod. Un. Hist. vii. 128.)

(*h*) Cod. 7. 71, *per tot.*

(*i*) Inst. 4. 6. 40.

(*k*) Nov. 135, c. 1.

cases where the dividend paid affords reasonable evidence that he has not been wantonly speculating at the risk of others, without funds of his own,) entitle himself to a return of part of his assets. (See the 128th & 129th sections of the same statute.)

The laws of England, more wisely, have steered in the middle between both extremes: providing at once against the inhumanity of the creditor, who is not suffered to confine an honest bankrupt after his effects are delivered up; and at the same time taking care that all his just debts shall be paid, so far as the effects will extend. But still they are cautious of encouraging prodigality and extravagance by this indulgence to debtors; and therefore they allow the benefit of the laws of bankruptcy to none but actual *traders*; since that set of men are, generally speaking, the only persons liable to accidental losses, and to an inability of paying their debts, without any fault of their own. If persons in other situations of life run in debt without the power of payment, they must take the consequences of their own indiscretion, even though they meet with sudden accidents that may reduce their fortunes: for the law holds it to be an unjustifiable practice, for any person but a trader to encumber himself with debts of any considerable value. If a gentleman, or *one in a liberal profession, at the time of contracting his debts, has a sufficient fund to pay them, the delay of payment is a species of dishonesty, and a temporary injustice to his creditor: and if, at such time he has no sufficient fund, the dishonesty and injustice is the greater. He cannot therefore murmur, if he suffers the punishment which he has voluntarily drawn upon himself. But in mercantile transactions the case is far otherwise. Trade cannot be carried on without mutual credit on both sides: the contracting of debts is therefore here not only justifiable, but necessary. And if by accidental calamities, as, by the loss of a ship in a tempest, the failure of brother traders, or by the non-payment of persons out of trade, a merchant or trader becomes incapable of discharging his own debts, it is his misfortune and not his fault. To the misfortunes, therefore, of debtors, the law has given a compassionate remedy, but denied it to their faults: since, at the same time that it provides for the security of commerce, by enacting that every considerable trader may be declared a bankrupt, for the benefit of his creditors as well as himself, it has also (to discourage extravagance) declared that no one shall be capable of being made a bankrupt, but only a *trader*; nor capable of receiving

The bankrupt laws only applicable to actual traders.

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the full benefit of the statutes, but only an *industrious* trader (6).

Of the several statutes formerly in force concerning bankrupts.

The first statute made concerning any English bankrupts, was 34 Hen. VIII. c. 4, when trade began first to be properly cultivated in England: which has been almost totally altered by statute 13 Eliz. c. 7, whereby bankruptcy is confined to such persons only as have *used the trade of merchandize*, in gross or by retail, by way of bargaining, exchange, re-change, bartering, chevissance⁽¹⁾, or otherwise; or have *sought their living by buying and selling* (7). And by

(1) That is, making contracts. (Dufresne, II. 569.)

(6) In the last edition of this volume it was observed that, Sir Wm. Blackstone has forgotten, or omitted, to present the reverse of that medal, of which he has given so pleasing an exhibition. None but traders, it is true, can be made bankrupts; but, on the other hand, as the law now stands, the real estates of none but traders can be made liable for their simple contract debts. It is, therefore, much more like a boon, than a punishment (as our author would represent it,) to the aristocracy, to confine the operation of the bankrupt laws to traders. Public opinion, however, begins to be strongly in favour of the propriety of making every debtor's lands liable to all just claims upon him; and when, amongst the last lingering remains of feudality, the distinction between real and personal estate, in respect to the liability to the owner's debts, shall be done away; then, our author's representation will be accurate.

Since the preceding part of this note was first published, the statute of 3 & 4 Gul. IV. c. 104, has passed, by which it is enacted, that when any person dies seised of or entitled to any estate or interest in either freehold or copyhold estates, which he has not charged with or devised subject to the payment of his debts, the same shall be assets to be administered in courts

of equity, for the payment of the just debts of such person, as well debts due on simple contract as on specialty; but the debts by specialty in which the heirs are bound, are to be paid in full, before debts by simple contract or by specialty, in which the heirs are not bound, are payable.

(7) Our author intimates, in page 477, that a *fiat* of bankruptcy taken out against an infant, is of no legal validity. (*Ex parte Adam*, 1 Ves. & Bea. 494; *Ex parte Barwis*, 6 Ves. 401.) But, where an infant has held himself out to the world as an adult and *sui juris*, contracting debts as such, a court of equity will not be disposed summarily to supersede a *fiat* against him, on his petition; but will leave him to bring his action at law. (*Ex parte Watson*, 16 Ves. 266.) Married women cannot, generally speaking, be made bankrupts; but a *feme-coverte* being a sole trader in London, and the wife or daughter of a freeman, is, by the custom of the city, liable to a *fiat* of bankruptcy. (*La Vie v. Philips*, 1 W. Bla. 574; *Ex parte Carrington*, 1 Atk. 206.) And, in cases not coming within the custom of London, if a married woman be so circumstanced as to be subject to a common law execution, it seems, she will likewise be subject to a *fiat* of bankruptcy, (*Ex parte Preston*, Cooke's B.

statute 21 Jac. I. c. 19, persons using the trade or profession of a *scrivener*, receiving other men's monies and estates into their trust and custody, are also made liable to the statutes of bankruptcy: and the benefits, as well as the penal parts of the law, are *extended as well to *aliens* and *denizens* as to natural-born subjects; being intended entirely for the protection of trade, in which aliens are often as deeply concerned as natives(8). By many subsequent statutes, but lastly by statute 5 Geo. II. c. 30 (m), *bankers*, *brokers*, and *factors*, are declared liable to the statutes of bankruptcy; and this upon the same reason that scriveners are included by the statute of James I., viz. for the relief of their cre-

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(m) Sect. 39.

L. ch. 3, s. 1,) which is considered pretty much in the nature of a statute execution. (*Ex parte Detastet*, 17 Ves. 251; *Ex parte Barned*, 1 Glyn & Jameson, 311; *Ex parte Freeman*, 1 Ves. & B. 41; *Ex parte Brown*, Ibid. 66; *In the matter of Wait*, 1 Jac. & Walk. 610; *Lee v. Lopez*, 1 Rose, 343.) It was laid down in *Ex parte Layton*, (6 Ves. 440,) that a lunatic cannot be made a bankrupt; but, in a later case, (reported *Anonymously* in 13 Ves. 590,) Lord Eldon held that, as a commission of lunacy will not protect the lunatic against an action, so, lunacy cannot be a defence against a *fiat* of bankruptcy, which is a species of action. The two decisions may, perhaps, be reconciled by a third, in which it was settled, upon very intelligible principles, that a lunatic cannot commit an act of bankruptcy; but, if the party was sane when he did the act upon which a *fiat* has issued, there is no reason why such *fiat* should not be supported. (*Ex parte Priddy*, decided 8th June, 1793.)

The second section of the consolidated bankrupt act (6 Geo. IV. c. 16,) enacts that all bankers, brokers, and persons using the trade of a scrivener, receiving other men's monies or estates into their trust or custody, and persons insuring ships, or their freight, or other matters, against perils of the

sea, warehousemen, wharfingers, packers, builders, carpenters, shipwrights, victuallers, keepers of inns, taverns, hotels, or coffee-houses, dyers, printers, bleachers, fullers, calenderers, cattle or sheep salesmen, and all persons using the trade of merchandize by way of bargaining, exchange, bartering, commission, consignments, or otherwise, in gross, or by retail; and all persons who, either for themselves, or as agents or factors for others, seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities, shall be deemed traders liable to become bankrupt: Provided, that no farmer, grazier, common labourer, or workman for hire, receiver-general of the taxes, or member of or subscriber to any incorporated, commercial, or trading companies established by charter or act of parliament, shall be deemed, as such, a trader liable by virtue of the said act to become bankrupt.

(8) Mr. Christian observes, that "any person, whether native, denizen, or alien, who trades to England, although he never resides here as a trader, may be a bankrupt, if he should come to England and commit an act of bankruptcy whilst he is here. Cowp. 398." [And see *Allen v. Cannon*, 4 Barn. & Ald. 419.—ED.]

ditors; whom they have otherwise more opportunities of defrauding than any other set of dealers: and they are properly to be looked upon as traders, since they make merchandize of money, in the same manner as other merchants do of goods and other moveable chattels. But by the same act(*n*), no *farmer, grazier, or drover*, shall (as such) be liable to be deemed a bankrupt(*9*): for, though they buy and sell corn, and hay, and beasts, in the course of husbandry, yet trade is not their principal, but only a collateral, object; their chief concern being to manure and till the ground, and make the best advantage of its produce. And, besides, the subjecting them to the laws of bankruptcy might be a means of defeating their landlords of the security which the law has given them above all others, for the payment of their reserved rents; wherefore, also, upon a similar reason, a *receiver of the king's taxes* is not capable(*o*), as such, of being a bankrupt; lest the king should be defeated of those extensive remedies against his debtors, which are put into his hands by the prerogative. By the same statute(*p*), no person shall have a commission of bankrupt

(*n*) Sect. 40.

(*o*) Ibid.

(*p*) Sect. 23.

(9) Mr. Christian observes, that "although a farmer, grazier, and drover, cannot from their respective occupations alone be bankrupts, yet if they buy and sell, or are dealers independently of these characters, they become, like other traders, subject to the bankrupt laws: as, one farmer was declared a bankrupt, who bought large quantities of potatoes, not for planting or consuming upon his farm, but for selling again for profit; (1 Str. 513;) and another, who occasionally bought horses, not for the use of his farm, but to make a profit of by reselling. (1 T. R. 517.) A farmer, who makes upon his farm bricks for sale, from earth not taken from the farm, may be a bankrupt. (1 Bro. 173.) But where a man rented a farm, wherein there was a brick ground, upon which he dug the clay and manufactured bricks for sale, the court of Common Pleas decided he could not be a bank-

rupt; but this judgment was afterwards reversed by the court of King's Bench. (1 T. R. 34; Cooke, 52, 3rd edit.)" [If a person make bricks of the earth on his own estate, and sell them as a mode of enjoying the profits of real estate, he is no trader, within the purview of the bankrupt laws. (*Heane v. Rogers*, 9 Barn. & Cress. 589; 4 Man. & R. 498, S. C.; *Ex parte Gallimore*, 2 Rose, 424.)

[In *Ex parte Ridge*, (1 Ves. & Bea. 360,) it was held that a farmer making lime, from a lime-pit opened before the commencement of his term, and selling the surplus beyond what he wanted for manure, is not a trader within the bankrupt laws. (And see *Sutton v. Weely*, 7 East, 446.) *Drovers* are not particularised in the consolidated bankrupt act, (6 Geo. IV. c. 16,) but cattle and sheep *salesmen* are expressly declared to be within the purview of the act.—ED.]

awarded against him, unless at the petition of some *one* creditor, to whom he owes 100*l.*; or of *two*, to whom he is indebted 150*l.*; or of *more*, to whom altogether he is indebted 200*l.*(10). For the law does not look upon persons whose debts amount to less, to be traders considerable enough, either to enjoy the benefit of the statutes themselves, or to entitle the creditors, for the benefit of public commerce, to demand the distribution of their effects.

*In the interpretation of these several statutes, it hath been held, that buying only, or selling only, will not qualify a man to be a bankrupt; but it must be both buying and selling, and also getting a livelihood by it. As, by exercising the calling of a merchant, a grocer, a mercer, or in one general word, a *chapman*(11), who is one that buys and sells any thing. But no handicraft occupation (where nothing is bought and sold, and where therefore an extensive credit for the stock in trade is not necessary to be had) will make a man a regular bankrupt; as that of a husbandman, a gardener, and the like, who are paid for their work and labour(*q*). Also an inn-keeper cannot, as such, be a bankrupt(*r*)(12): for his gain or livelihood does not arise from buying and selling in the way of merchandize, but greatly from the use of his rooms and furniture, his attendance, and

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To constitute a trader within the meaning of the bankrupt law, the party must be one who buys and sells and seeks his livelihood by his trade.

(*q*) Cro. Car. 31.

(*r*) Cro. Car. 549 ; Skinn. 291.

(10) The amount of the debt of the petitioning creditor, or creditors, is still fixed at the sums stated in the text; but the 15th section of the statute of 6 Geo. IV. c. 16, enacts that every person who has given credit to any trader upon valuable consideration for any sum payable at a certain time, which time shall not have arrived when such trader committed an act of bankruptcy, may be a petitioning creditor, whether he shall have any security in writing, or otherwise, for such sum or not.

(11) It has been long held that, if the affidavit of debt term the debtor a "dealer and chapman," that is a sufficient description of trading to support a commission of bankruptcy. And a general statement in the commission,

that the bankrupt "got his living by buying and selling," is enough to support it, though the bankrupt is described as a waterman: (*Ex parte Herbert*, 2 Ves. & Bea. 400:) for, no clearer information can be received from the expression "dealer and chapman," than would be conveyed by the description of the bankrupt as one who "gained his livelihood by buying and selling;" which general statement will admit the finding of any particular trading. (*Hale v. Small*, 2 Brod. & Bing. 27; 4 Moore, 420; *S. C.* 2 Wils. Cha. Ca. 86.)

(12) The act of 6 Geo. IV. c. 16, expressly enacts, that inn-keepers shall be subject to the bankrupt laws: see *ante*, the concluding paragraph of note (7) to p. 474.

the like: and though he may buy corn and victuals, to sell again at a profit, yet that no more makes him a trader, than a schoolmaster or other person is, that keeps a boarding house, and makes considerable gains by buying and selling what he spends in the house; and such a one is clearly not within the statutes(*s*). But where persons buy goods, and make them up into saleable commodities, as shoe-makers, smiths, and the like; here, though part of the gain is by bodily labour, and not by buying and selling, yet they are within the statutes of bankrupts(*t*): for the labour is only in melioration of the commodity, and rendering it more fit for sale.

One single act of buying and selling will not constitute a trader.

One single act of buying and selling will not make a man a trader(13); but a repeated practice, and profit by it. Buying and selling bank-stock, or other government securities, will not make a man a bankrupt; they not being goods,

(*s*) Skinn. 292; 3 Mod. 330.

(*t*) Cro. Car. 31; Skinn. 292.

(13) It has been decided, that, a single purchase, made with intent to sell again, is enough to constitute a trading, so as to bring the party within the purview and operation of the bankrupt laws. (*Holroyd v. Gwynne*, 2 Taunt. 176; *Newland v. Bell*, Holt's N. P. C. 223.) This, however, must be qualified: Lord Ellenborough held, that a fisherman, who bought fish at sea from other boats, for the purpose of making up his own cargo, which he carried ashore and sold, was a trader within the meaning of the bankrupt laws: (*Heanny v. Birch*, 3 Campb. 233:) but, Lord Eldon, adverting to this decision, expressed his opinion to be, that, although it would be immaterial whether the acts were few or many, if the fisherman went out for the purpose of buying fish, that would make him a general trader; still, if the case were no more than that a person who went to sea to fish, and, not obtaining a sufficient cargo, buys a few fish to make it up, it would be hasty to say that such a partial buying would amount to a general trading.

Such a case, his lordship added, must always depend upon its own particular circumstances, and be properly the subject of a trial at law. It was further observed, that a farmer, who is converting his apples, the fruit of his orchard, into cider, and finding he has not a sufficient supply from his own orchard, makes up the deficiency by purchasing apples from his neighbours; or the owner and worker of a coal-mine who buys small articles, as bread, cheese, &c., in order to sell them again to his own pit-men; does not thereby render himself a trader within the bankrupt laws. (*Ex parte Gallimore*, 2 Rose, 427, 428.)

But, it seems quite clear, the question of law is not now governed by the *quantum* of the trading; it is a settled rule, that, if any stranger may be supplied with the commodity which is sold, and it is not sold as a favour to any particular person, there, the person so selling is subject to the bankrupt laws. (*Patman v. Vaughan*, 1 T. R. 573; *Wright v. Bird*, 1 Price, 22.)

wares, or merchandize, within the intent of the statute, by which a profit may be fairly made(*u*). Neither will buying and selling under particular restraints, or for particular purposes; as, if *a commissioner of the navy uses to buy victuals for the fleet, and dispose of the surplus and refuse, he is not thereby made a trader within the statutes(*w*). An infant (14), though a trader, cannot be made a bankrupt; for an infant can owe nothing but for necessities: and the statutes of bankruptcy create no new debts, but only give a speedier and more effectual remedy for recovering such as were before due: and no person can be made a bankrupt for debts which he is not liable at law to pay(*x*). But a feme-covert in London, being a sole trader according to the custom, is liable to a commission of bankrupt (*y*) (15).

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2. Having thus considered, who may, and who may not, be made a bankrupt, we are to inquire, secondly, by what *acts* a man may become a bankrupt (16). A bankrupt is “a

2. What acts make a bankrupt.

(*u*) 2 P. Wms. 308.

(*x*) Lord Raym. 443.

(*w*) 1 Salk. 110; Skinn. 292.

(*y*) *La Vie v. Philips*, M. 6 Geo. III. B. R.

(14) See *ante*, note (7) to p. 474.

(15) See the reference given in the last note.

(16) The 3rd, 4th, and 5th sections of the statute of 6 Geo. IV. c. 16, enact, that, if any trader shall depart this realm, or, being out of this realm, shall remain abroad, or depart from his dwelling-house, or otherwise absent himself, or begin to keep his house, or suffer himself to be arrested for any debt not due, or yield himself to prison, or suffer himself to be outlawed, or procure himself to be arrested, or his goods, money, or chattels, to be attached, sequestered, or taken in execution, or make or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels, or make or cause to be made any fraudulent gift, delivery, or transfer, of any of his goods or chattels; every such trader, doing, suffering, procuring, executing, permitting, making, or causing to be made, any of the acts, deeds, or mat-

ters aforesaid, with intent to defeat or delay his creditors, shall be deemed to have thereby committed an act of bankruptcy. But a conveyance of all a trader's property, in trust for the benefit of his creditors, shall not be deemed an act of bankruptcy, unless a *fiat* issue within six calendar months from the execution of such conveyance, provided such trust deed is executed by each of the trustees within fifteen days after the execution thereof by the trader, and the execution of each party is attested by an attorney or solicitor, and due notice is published in the Gazette and newspapers. And it is also enacted, that, if any trader, having been arrested or committed to prison for debt, or on attachment for non-payment of money, shall, upon such or any other arrest, or commitment for debt or non-payment of money, or upon any detention for debt, lie in prison for twenty-one days after any detainer for debt lodged against him, and not discharged, every such trader shall be deemed

“trader, who secretes himself, or does certain other acts, tending to defraud his creditors.” We have hitherto been employed in explaining the former part of this description, “a trader;” let us now attend to the latter, “who secretes himself, or does certain other acts tending to defraud his creditors.” And, in general, whenever such a trader, as is before described, hath endeavoured to avoid his creditors, or evade their just demands, this hath been declared by the legislature to be an act of bankruptcy, upon which a commission may be sued out. For, in this extrajudicial method of proceeding, which is allowed merely for the benefit of commerce, the law is extremely watchful to detect a man, whose circumstances are declining, in the first instance, or at least as early as possible; that the creditors may receive as large a proportion of their debts as may be; and that a man may not go on wantonly wasting his substance, and then claim the benefit of the statutes, when he has nothing left to distribute.

The several acts
of bankruptcy
prior to the 6
Geo. IV. c. 16.

[* 478] To learn what the particular acts of bankruptcy are, which render a man a bankrupt, we must consult the several statutes, and the resolutions formed by the courts thereon. *Among these may therefore be reckoned, 1. Departing from the realm, whereby a man withdraws himself from the jurisdiction and coercion of the law, with intent to defraud his creditors (z) (17). 2. Departing from his own

(z) Stat. 13 Eliz. c. 7.

to have thereby committed an act of bankruptcy; or, if any trader, having been arrested, committed, or detained for debt, shall escape out of prison or custody, every such trader shall be deemed to have thereby committed an act of bankruptcy from the time of such arrest, commitment, or detention. And by the 8th section of the same statute, it is enacted, that any trader who shall, after a docket struck against him, compound with the petitioning creditor, so as to pay or give him security for more in the pound in respect of his debt than the other creditors, shall be held to have thereby committed an act of bankruptcy; and if any *fiat* has issued upon the

docket so struck, the Lord Chancellor may either supersede the same, or order it to be proceeded in, as he shall see fit: and the creditor so compounding shall forfeit his whole debt, and refund or deliver up the payment or security so by him received.

(17) A *fiat* of bankruptcy cannot be sustained merely by showing that the debtor is residing abroad, more especially if the debt was not due when he went abroad; for, in such case, what date could be given to the act of bankruptcy? If a man goes out of the kingdom with a fair intention, and for a proper purpose; that, it has been long determined, will not be an act of bankruptcy,

house, with intent to secrete himself, and avoid his creditors (a) (18). 3. Keeping in his own house, privately, so as not to be seen or spoken with by his creditors, except for just and necessary cause; which is likewise construed to be

(a) Ibid.; Stat. 1 Jac. I. c. 15.

though creditors are delayed. Then, suppose a man who was not in debt when he went abroad, continues to reside there after debts are contracted here by his agent or partner,—how can his leaving this kingdom be connected as an act of bankruptcy with the posterior debt? (*Ex parte Mutrie*, 5 Ves. 578.) And though a tradesman is actually indebted at the time of his departure from the realm, and some of his creditors may suffer delay in consequence of that departure, it will not be an act of bankruptcy, without proof or necessary inference that the departure was with an intent, at the very time, to delay creditors. (*Ex parte Osborne*, 2 Ves. & Bea. 179.)

(18) The departure of a trader from his dwelling-house, with *intent* to delay his creditors, (*Fowler v. Padget*, 7 T. R. 514,) is an act of bankruptcy, though no creditor be in fact delayed thereby. (*Robertson v. Liddell*, 9 East, 491; *Williams v. Nunn*, 1 Taunt. 270; *Bayly v. Schofield*, 1 Mau. & Sel. 352; *Harvey v. Ramsbottom*, 1 Barn. & Cress. 60; 2 D. & R. 112, S. C.) But many circumstances may afford a satisfactory explanation of a trader's conduct in departing from his dwelling-house; (*Wydown's case*, 14 Ves. 90;) and whether such departure was accompanied with an intent to delay a creditor, is a question of fact, which is proper, in most cases, to be left to a jury to determine, upon all the circumstances. (*Aldridge v. Ireland*, cited in 1 Taunt. 273.) But, if a trader quitted his dwelling-house with the intention of delaying a creditor,

the act of bankruptcy will not be less complete because it was committed under the impression of a groundless apprehension. For instance, if a debtor, knowing that a writ is out against him, and seeing a bailiff coming to his house, absconds, the act of bankruptcy is complete, although the officer in fact had not the writ with him. (*Ex parte Bamford*, 15 Ves. 459.)

A trader may be guilty of an act of bankruptcy, not only by departing from the realm, or absconding from his dwelling-house, but by "otherwise absenting himself," if he does so with *intent* to delay his creditors: (*Harvey v. Ramsbottom*, 1 Barn. & Cress. 60; 2 D. & R. 142, S. C.; *Judine v. Da Cossen*, 1 New Rep. 235; *Gimingham v. Laing*, 2 Marsh. 241;) and, in such case also, the act of bankruptcy depends on the *intent* to delay; it is immaterial whether that intent was productive of actual delay or not. (*Chenoweth v. Hay*, 1 Mau. & Sel. 679.) But, a debtor's mere breach of an appointment to meet his creditor at a specified place, (not being the debtor's abode or usual place of business,) without any evidence that the debtor absented himself from the place appointed, with a view to delay his creditors, does not present even a *prima facie* case of an act of bankruptcy. (*Tucker v. Jones*, 2 Bing. 3.) The case might be very different if the place of appointment were that in which the debtor was in the habit of giving daily attendance, for the purpose of carrying on his trade. (*Gimingham v. Laing*, 2 Marsh. 241.)

an intention to defraud his creditors, by avoiding the process of the law (b) (19) (20). 4. Procuring or suffering himself willingly to be arrested, or outlawed, or imprisoned, without just and lawful cause; which is likewise deemed an attempt to defraud his creditors (c) (21). 5. Procuring his money,

(b) Stat. 13 Eliz. c. 7.

(c) Ibid. 1 Jac. I. c. 15.

(19) An act of bankruptcy may be committed by denial to a person who knows that the debtor is in the house, and actually hears him give directions to be denied, and even sees him through the window of a partition: the proof of beginning to keep house depending, not upon the possibility of gaining access to the debtor, but upon his intention in denying himself. (*Ex parte Bamford*, 15 Ves. 460.) If a trader gives a general order to be denied to all comers, this is sufficient evidence of a beginning to keep house with intention to delay creditors; and may constitute an act of bankruptcy, though no creditor is actually delayed by such order: (*Lloyd v. Heathcote*, 2 Brod. & Bing. 391; *Harvey v. Ramsbottom*, 1 Barn. & Cress. 61; 2 D. & R. 142, S. C.:) *Ex parte White*, 3 Ves. & Bea. 129:) for, it is not the denial of access when a creditor calls which constitutes an act of bankruptcy; *that* is only evidence, if unexplained, of an act of bankruptcy, committed either by keeping house, or absconding therefrom, with *intent* to delay creditors. (*Bayly v. Schofield*, 1 Mau. & Sel. 352; *Robertson v. Liddell*, 9 East, 494; *Lloyd v. Heathcote*, 2 Brod. & Bing. 392.)

A denial given to a creditor by the debtor's servant, which denial the master subsequently approves, will not amount to an act of bankruptcy, if it cannot be connected with a previous direction by the master that such denial should be given; or if, in the interval between such denial and the approbation thereof, the debtor

has seen and conversed with the creditor. (*Ex parte Foster*, 17 Ves. 416.) But, if a trader gives a general order to be denied, and is denied to a creditor, it is a "beginning to keep house," within the meaning of the statute, though the debtor immediately overtakes the creditor and says he was not afraid of *him*. (*Mucklow v. May*, 1 Taunt. 483.)

(20) Mr. Christian, in his note upon this passage of the text, extracts the following observations from Cooke's B. L. "A denial that the trader is at home, (when in fact he is,) by his order or approbation, to a creditor or his servant, who comes to demand payment of a debt, is *prima facie*, and is generally admitted, evidence of this act of bankruptcy; yet, if the denial were made, not to delay payment, but for some other cause, as sickness, company, business, or the unseasonableness of the hour, it does not amount to an act of bankruptcy."

[A denial on a *Sunday* is not an act of bankruptcy, although the debtor may have appointed that day for settling accounts with his creditor. (*Ex parte Preston*, 2 Ves. & Bea. 212.)—ED.]

(21) With respect to this, and the subsequent acts of bankruptcy detailed by our author in the text, it is necessary to refer to the statute of 6 Geo. IV. c. 16, which is differently worded, and in some respects very materially so, from the statutes upon which Blackstone was commenting. See the sections of the modern statute which relate to this matter, cited *ante*, in note (16) to this chapter.

goods, chattels, and effects, to be attached or sequestered by any legal process ; which is another plain and direct endeavour to disappoint his creditors of their security (*d*). 6. Making any fraudulent conveyance to a friend, or secret trustee, of his lands, tenements, goods, or chattels ; which is an act of the same suspicious nature with the last (*e*)(22).

(*d*) Stat. 1 Jac. I. c. 15.

(*e*) Ibid.

(22) The statute of 6 Geo. IV. c. 16, (as stated *ante*, in the last note to p. 477, which see,) enacts, that a conveyance of the whole even of a trader's property, in trust for the benefit of his creditors, though it necessarily takes such effects out of the ordinary course of distribution by process of law, shall not be *ipso facto*, as it formerly was, an act of bankruptcy.

Under the words of the recent statute, in order to prove any grant or conveyance made by a trader, to be an act of bankruptcy, it seems necessary to show, that the transfer was made with intent to delay his creditors. To ascertain the intent, parol evidence is let in ; and the fraudulent intention is to be collected, not merely from the form of the instrument, but from all the circumstances which can show what was its proposed or necessary operation. (*Ex parte Cawkwell*, 19 Ves. 234 ; *Dutton v. Morrison*, 17 Ves. 169 ; *Ex parte Bourne*, 16 Ves. 148 ; *Gibbins v. Phillips*, 7 Barn. & Cress. 534 ; 2 Man. & R. 247. S. C.) Where the subject of such a grant is left in the possession and disposal of the bankrupt, the transaction is clearly fraudulent ; and the property will, of course, go to the general creditors of the grantor. (*M'Neill v. Cahill*, 2 Bligh, 260 ; *ex parte Smith*, 1 Ves. & Bea. 522.)

If a man, though not in trade at the time of his marriage, appears to look forward to the purpose of becoming a trader, and the possible consequences of that purpose, and limits an estate or interest to his wife upon

the contingency of his becoming a bankrupt : such a limitation being plainly and obviously adopted solely with an intent of evading the bankrupt laws, the estate or interest will go to the settlor's creditors, should he eventually become a bankrupt. (*Higinbotham v. Holme*, 19 Ves. 92.) Post-nuptial settlements, made by a man who afterwards becomes a bankrupt, cannot be supported as against his assignees ; (*Beaumont v. Thorp*, 1 Ves. sen. 27 ;) unless the settlement was made in pursuance of antenuptial articles, clearly proved ; (*Kelly v. Power*, 2 Ball & Beat. 251 ; *Sir Ralph Bovy's case*, 1 Ventr. 193 ; *Battersbee v. Farrington*, 1 Swanst. 113 :) or unless it was made under the direction of a court of equity : (*Wheeler v. Caryl*, Ambl. 121 ; *Ball v. Coutts*, 1 Ves. & Bea. 299 :) or in consideration of an additional portion then received by the husband from his wife's friends. (*Brown v. Jones*, 1 Atk. 190 ; *Ward v. Shallett*, 2 Ves. sen. 16 ; *ex parte Hall*, 1 Ves. & Bea. 114 ; *Doe v. Routledge*, Cowp. 711.)

With respect to payments made, or securities for just debts given, by an insolvent on the eve of his bankruptcy, the material question will be, whether the payment was made, or the security given, by the debtor voluntarily, with an intent to give a preference to a particular creditor (which would be fraudulent and void,) or whether it was made in consequence of the pressing importunity of the creditor ; for, in the latter case, actual payments, at all events, could not be

7. Procuring any protection, not being himself privileged by parliament, in order to screen his person from arrests; which also is an endeavour to elude the justice of the law (*f*) (23). 8. Endeavouring or desiring, by any petition to the king, or bill exhibited in any of the king's courts against any creditors, to compel them to take less than their just debts; or to procrastinate the time of payment originally contracted for; which are an acknowledgment of either his poverty or his knavery (*g*). 9. Lying in prison for two months (24), or more, upon arrest or other detention for debt, without finding bail in order to obtain his liberty (*h*). For, the inability to procure bail, argues a strong deficiency in his credit, owing either to his suspected poverty, or ill character; and his neglect to do it, if able, can arise only from a fraudulent intention; in either of which cases, it is high time for his creditors to look to themselves, *and compel a distribution of his effects. 10. Escaping from prison after an arrest (25) for a just debt of 100*l.* or upwards (*i*). For, no man would break prison, that was able and desirous

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(*f*) Stat. 21 Jac. I. c. 19.(*g*) Ibid.(*h*) Ibid.(*i*) Ibid.

recalled. (*Fidgeon v. Sharpe*, 5 Taunt. 545; *Poland v. Glyn*, 2 Dowl. & Ryl. 312. Stat. 6 Geo. IV. c. 16, s. 82.) The object of the debtor, under such circumstances, is, not to give a preference, but to deliver himself: and it should seem, this consideration would be sufficient to bring the transaction, whether it was one of actual payment or a delivery of securities, within the benefit of the exception contained in the 72nd section of the consolidated bankrupt act, already cited. (And see *Ex parte Scudamore*, 3 Ves. 88.) There has been no disposition evinced of late, by courts of law, to make *bond fide* creditors refund monies they have received from their debtor, on the ground that all such payments by an insolvent must have been intended to give a fraudulent preference. It must be shown, not only that the debtor knew himself to be insolvent, but also, that at the time of payment he actually con-

templated bankruptcy. (*Atkinson v. Brindall*, 2 Bing. N. C. 225.) But, where a debtor, though under the pressure of a hostile creditor, conveyed his real estates to trustees to sell to pay that creditor, and with a *further trust* to pay debts to certain relations, *to give them a preference*, this was decided to be clearly an act of bankruptcy. (*Morgan v. Horseman*, 3 Taunt. 241; *Pulling v. Tucker*, 4 Barn. & Ald. 384.)

(23) By the statute of 7 Ann. c. 12, s. 5, declaring the privilege of ambassadors and their train, it is enacted, that no merchant or other trader whatsoever, within the description of any of the statutes against bankrupts, shall have any benefit by that act.

(24) See the present legislative enactments on this head stated, *ante*, in note (16) to p. 477.

(25) See the reference given in the last note.

to procure bail ; which brings it within the reason of the last case. 11. Neglecting to make satisfaction for any just debt to the amount of 100*l.* within two months after service of legal process for such debt, upon any trader having privilege of parliament (*k*) (26).

(*k*) Stat. 4 Geo. III. c. 33.

(26) By the 9th section of the statute of 6 Geo. IV. c. 16, it is enacted, that, if any trader having privilege of parliament shall commit any of the acts of bankruptcy previously mentioned in the said act, (for an enumeration of which see *ante*, note (16) to this chapter,) a *fiat* of bankruptcy may issue against him, and he may be proceeded against in like manner as other bankrupts, except that he cannot be arrested or imprisoned during the time of such privilege, unless in cases declared by the said act to amount to felony. The 10th section of the statute enacts, that, if any creditor of such trader having privilege of parliament, shall file an affidavit, in any court of record at Westminster, of a debt of sufficient amount to support a commission, justly due to him from such trader, and shall sue out a summons and serve the same upon such trader, if such trader shall not, within one calendar month after personal service of such summons, pay, secure, or compound such debt to the satisfaction of such creditor ; or enter into a bond, with two sufficient sureties, to pay such sum as shall be recovered in an action against him for the said debt, together with such costs as shall be given in the same, and also cause an appearance to be entered in such action, every such trader shall be deemed to have committed an act of bankruptcy from the time of the service of such summons, and any creditor or creditors, whose debts are of sufficient amount, may sue out a *fiat* against him, and proceed thereon in like manner as against

other bankrupts. And, by the 11th section of the statute it is enacted, that, when any decree or order shall have been pronounced in any court of equity, or any order shall have been made in any matter of bankruptcy, or of lunacy, against any person within the description of the statutes relating to bankrupts, but having privilege of parliament, thereby ordering such person to pay any sum of money, and such trader shall disobey, the same having been duly served upon him, the person entitled to receive the money, or interested in enforcing the payment thereof, may apply to the court to fix a peremptory day for payment, which shall accordingly be fixed by order for that purpose ; and, if such trader, being personally served with such last-mentioned order eight days before the day therein appointed for payment of the money, shall neglect to pay the same, he shall be deemed to have committed an act of bankruptcy from the time of the service thereof ; and a *fiat* may be sued out against him.

For the preservation of the dignity and independence of parliament, it is enacted, by the statute 52 Geo. III. c. 144, that, whenever a member of the House of Commons shall be declared a bankrupt, his right of sitting and voting in the said House shall be suspended for twelve months, unless within that period the said *fiat* shall be superseded ; or unless the creditors shall be paid or satisfied their full debts ; provided that any disputed debts which such bankrupt shall have given bond, with two sureties, to pay, if the said debts are, by any proceed-

The private removal of goods to prevent their being seized in execution, not an act of bankruptcy.

A banker's stopping payment, no act of bankruptcy.

These are the several acts of bankruptcy, expressly defined by the statutes relating to this title (27): which being so numerous, and the whole law of bankrupts being an innovation on the common law, our courts of justice have been tender of extending or multiplying acts of bankruptcy by any construction or implication. And, therefore, Sir John Holt held (*l*), that a man's removing his goods privately to prevent their being seized in execution, was no act of bankruptcy. For, the statutes mention only fraudulent gifts to third persons, and procuring them to be seized by sham process in order to defraud creditors: but this, though a palpable fraud, yet falling within neither of those cases, cannot be adjudged an act of bankruptcy. So also, it has been determined expressly, that a banker's stopping or refusing payment is no act of bankruptcy; for it is not within the description of any of the statutes, and there may be good reasons for his so doing, as suspicion of forgery, and the like: and if, in consequence of such refusal, he is arrested, and puts in bail, still it is no act of bankruptcy (*m*): but, if he goes to prison, and lies there two months (28), then, and not before, he is become a bankrupt.

(*l*) Lord Raym. 725.

(*m*) 7 Mod. 139.

ing in law or equity recovered against him, shall, for the purposes of the act, be considered as paid or satisfied. And by the second section of the same act, it is declared that the seat of such member shall be absolutely vacated, if the *fiat* against him shall not be superseded within twelve months from the issuing thereof.

(27) Another act of bankruptcy is established by the 6th section of the statute of 6 Geo. IV. c. 16, which enacts, that, if any trader shall file in the office of the Lord Chancellor's secretary of bankrupts a declaration, signed by such trader, and attested by an attorney or solicitor, that he is insolvent, or unable to meet his engagements, such declaration shall, after insertion of an advertisement thereof in the London Gazette, be an act of bankruptcy committed at the time when such declaration was filed;

but no *fiat* shall issue thereon, unless it be sued out within two months next after the insertion of such advertisement, and unless such advertisement shall have been made within eight days after such declaration was filed: and no docket shall be struck upon such act of bankruptcy before the expiration of four days next after the insertion of such advertisement, in case such *fiat* is to be executed in London, or before the expiration of eight days, in case the *fiat* is to be executed in the country.

The 7th section of the statute enacts, that a *fiat* founded on such declaration shall not be invalid, because the declaration was concerted between the bankrupt and any creditor or other person.

(28) The time is now shortened to twenty-one days; see *ante*, p. 477, note.

We have seen *who* may be a bankrupt, and what *acts* will make him so: let us next consider,

3. The *proceedings* on a commission of bankrupt; so far as they affect the bankrupt himself. And these depend entirely *on the several statutes of bankruptcy; all which I shall endeavour to blend together, and digest into a concise methodical order.

3. The proceedings on a commission of bankruptcy. [* 480]

And, first, there must be a *petition* to the Lord Chancellor (29) by one creditor to the amount of 100*l.*, or by two to the amount of 150*l.*, or by three or more to the amount of 200*l.* (30); which debts must be proved by *affidavit* (n) (31) (32): upon which he grants a *commis-*

The petition.

(n) Stat. 5. Geo. II. c. 30.

(29) See the 12th section of stat. 1 & 2 Gul. IV. c. 56.

(30) See *ante*, p. 475, note.

(31) See the 13th section of the statute of 6 Geo. IV. c. 16. To support a *fiat* of bankruptcy, the petitioning creditor's debt must be a *legal* one. (*Ex parte Hillyard*, 2 Ves. sen. 407; *ex parte Lee*, 1 P. Wms. 782; *ex parte Sutton*, 11 Ves. 164.) The 16th section of the statute above cited enacts, that any creditor or creditors, whose debt or debts is or are sufficient to support a *fiat* against all the partners of any firm, may petition for a *fiat* against one or more partners of such firm, not including the whole: and the 18th section of the statute enacts, that if after adjudication the debt of the petitioning creditor be found insufficient to support a *fiat*, it shall be lawful for the Lord Chancellor, upon the application of any other creditor who has a debt sufficient to support a *fiat*, to order the existing *fiat* to be proceeded with. In the construction of this enactment, it has been held, that the debt of the petitioning creditor should be expunged by the commissioners, before any other creditor comes to have his own debt substituted in order to support the *fiat*; (*ex parte Chapple*,

2 Glyn & Jameson, 132;) but this doctrine was qualified in *ex parte Robinson*. (1 Mont. & M'Arth. 50.) A previous application must be made to the commissioners, but it is not necessary that the debt should have been expunged; indeed, this may in some cases be impossible, for it may perhaps never have been proved at all. The deposition of the petitioning creditor at the opening of the *fiat* is not a proof; it is merely taken *ex parte*, and the proof must be made at a public meeting. (*Ex parte Rawson*, 2 Glyn & Jameson, 354.)

A creditor who has brought an action, or instituted a suit, against his debtor for his debt, cannot petition for a *fiat* of bankruptcy, founded on the same debt, without relinquishing such action or suit: and, if the creditor has proceeded to take the debtor in execution, he cannot afterwards, though the debtor is discharged, sue out a *fiat* against him for the same debt, which has been legally satisfied by taking his body in execution: (*Cohen v. Cunningham*, 8 T. R. 125:) a creditor who has his debtor in prison or custody, cannot even come in and prove, in respect of the same debt, under a *fiat* sued out by another creditor, without giving a sufficient

sion(33) to such discreet persons as to him shall seem good, who are then styled commissioners of bankrupt(o). The petitioners, to prevent malicious applications, must be bound in a security of 200*l.* to make the party amends in case they do not prove him a bankrupt(34). And if, on

(o) 3 Stat. 13 Eliz. c. 7.

authority for the discharge of the bankrupt; (*Ex parte Knowell*, 13 Ves. 193;) for, it is enacted by the 59th section of the consolidated bankrupt act, that proving or claiming a debt under a *fiat* by any creditor shall be deemed an election by such creditor to take the benefit of such *fiat* with respect to the debt so proved or claimed: (*Ex parte Edwards*, 1 Mont. & M'Arth. 126; *ex parte Chambers*, Ibid. 132:) provided, that any creditor, who shall have so elected, if the *fiat* shall be afterwards superseded, may proceed in the action as if he had not so elected, and, in bailable actions, shall be at liberty to arrest the defendant *de novo*, if the defendant has not perfected bail, or, if the defendant has perfected bail, to have recourse against such bail.

(32) Mr. Christian observes, that "the petitioning creditor's debt must be contracted before the bankrupt left off trade. If a note or bill is drawn before the act of bankruptcy, but indorsed without fraud afterwards, the indorsee has the same right to petition for, and to prove it under the commission, as the original payee.

"If the petitioning creditor has a debt due to him less than 100*l.* at the time of the act of bankruptcy, and has a note indorsed to him afterwards, but before the suing out the commission of bankrupt, making up more than 100*l.*, this will be sufficient. (7 T. R. 498.)

"A debt by simple contract, of more than six years' standing, is sufficient to support a commission of bankruptcy. (5 Burr. 2630.)" [This

must not be received without great qualification. A bankrupt may apply to have a *fiat* superseded which has issued against him, upon a debt of more than six years' standing: though if *he* does not take advantage of the statute of limitations, *his debtors* will not be permitted to dispute on this ground, the validity of the *fiat*, in order to elude the payment of their debts to the assignees. (*Ex parte Dewdney*, 15 Ves. 492, 498; *Jellis v. Mountford*, 4 Barn. & Ald. 265; *ex parte Roffey*, 19 Ves. 471; *Mavor v. Payne*, 3 Bing. 287.)—Ed.] "An infant cannot be a petitioning creditor, because his bond to the great seal would be voidable. (3 Ves. jun. 554.)"

(33) Instead of a commission, a *fiat* is now issued by the Lord Chancellor, Master of the Rolls, Vice Chancellor, or such of the masters in chancery as the Lord Chancellor may appoint for that purpose.

(34) See the 13th section of the statute of 6 Geo. IV. c. 16. This statutory provision does not take away the common law remedy, which a party aggrieved by a *fiat* maliciously sued out against him previously had by way of action for damages, not limited; which may, in many cases, be more advantageous than the remedy upon the bond, confined to the sum of 200*l.* (*Wydown's case*, 14 Ves. 90; *ex parte Stokes*, 7 Ves. 407; *Holmes v. Wainewright*, 1 Swanst. 23.) On the other hand, as the statute of 5 Geo. II. upon which the last enactment is founded, was held to be not imperative on the court, but merely permissive; (*Ex*

the other hand, they receive any money or effects from the bankrupt, as a recompence for suing out the commission, so as to receive more than their rateable dividends of the bankrupt's estate, they forfeit not only what they shall have so received, but their whole debt (35). These provisions are made, as well to secure persons in good credit from being damnified by malicious petitions, as to prevent knavish combinations between the creditors and bankrupt, in order to obtain the benefit of a commission. When the

parte Gayter, 1 Atk. 144;) in a case where the whole penalty of the bond would be disproportioned to the injury sustained, the court will not assign the bond; though it may be disposed to direct the bond to stand as a security for damages, to be ascertained by a *quantum damnificatus*; (*Ex parte Rimene*, 14 Ves. 601; *ex parte Lane*, 11 Ves. 416;) unless the petitioning creditor who took out such *fiat* has himself become bankrupt; in which case, damages so ascertained would become a liquidated debt after his bankruptcy, and, as such, not recoverable under the *fiat* against him: under these circumstances, therefore, the bond would be ordered to stand as a security for such a specific sum as the court should think reasonable. (*Ex parte Rimene*, *ubi supra*.)

A general order in bankruptcy, dated 26th June, 1793, was issued by Lord Chancellor Loughborough, purporting, that if a commission (now a *fiat*) is to be executed in London, it shall be supersedeable for want of prosecution at the expiration of fourteen days after the date thereof; and, if it is to be executed in the country, it shall be supersedeable for the like cause at the expiration of twenty-eight days; and the first application for a *supersedeas*, and for a new commission, made by any other attorney or solicitor than the one at whose instance the supersedeable commission was issued, shall be preferred to an application for the same pur-

poses, by such attorney or solicitor.

This general order has been since declared to be a most wholesome one, in ordinary cases; (*Ex parte Mavor*, 19 Ves. 540; *ex parte Luke*, 1 Glyn & Jameson, 363;) still, it has been decided, that its application is discretionary; and that, if it were inflexible, a regulation intended to prevent fraud might frequently be made an instrument to forward it. (*Ex parte Freeman*, 1 Rose, 384; *ex parte Sanden*, 1 Rose, 86; *ex parte Leicester*, 6 Ves. 433.) If, therefore, the suer out of a *fiat* has always had a *bonâ fide* intention to prosecute that *fiat*, though some delay may have arisen, yet, when that delay is satisfactorily accounted for, the *fiat* will not be superseded. (*Ex parte Soppit*, Buck, 82; *ex parte Knight*, 2 Rose, 322.) When a *fiat* has been opened, and an adjudication thereunder obtained, it has been held that Lord Loughborough's order is satisfied, notwithstanding publication has not been made in the Gazette, within the number of days limited for *proceeding* under the *fiat* by that order. (*Ex parte Ellis*, 7 Ves. 136.) The case just cited, however, has been declared to stand alone, and to have been determined upon its own very particular circumstances. (*Ex parte Henderson*, Coop. 228.)

(35) See *ante*, p. 477, note; where the 8th section of the consolidated bankrupt act is cited.

Opening the
commission.

commission is awarded and issued, the commissioners are to meet, at their own expense, and to take an oath for the due execution of their commission, and to be allowed a sum not exceeding 20s. *per diem* each, at every sitting (36). And no commission of bankrupt shall abate, or be void, upon any demise of the crown (*p*) (37).

The adjudica-
tion.

When the commissioners have received their commission, they are first to receive proof of the person's being a trader, and having committed some act of bankruptcy (38); and then to declare him a bankrupt, if proved so; and to give notice thereof in the Gazette, and at the same time to appoint three meetings. At one of these meetings an election must be made of *assignees* (39), or persons to whom the bankrupt's estate shall be assigned, and in whom it shall be vested for the benefit of the creditors; which assignees are to be chosen by the major *part, in value, of the creditors who shall then have proved their debts: but may be origi-

Choice of assign-
ees.

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(*p*) Stat. 5 Geo. II. c. 30.

(36) The 22nd section of the statute 6 Geo. IV. c. 16, enacts, that the commissioners shall receive the fee of twenty shillings for every meeting, and the like sum for every deed of conveyance executed by them, and for the signature of the bankrupt's certificate; and where any *fiat* shall be executed in the country, every commissioner, being a barrister at law, shall receive a further fee of twenty shillings for each meeting; and in case the usual residence of such commissioner is distant seven miles or upwards from the place where such meetings are holden, he shall receive a further sum of twenty shillings for each of such meetings which he attends.

(37) The 26th section of the statute of 6 Geo. IV. c. 16, enacts, that no *fiat* shall abate by demise of the crown, and that any *fiat* may be renewed, (if by reason of the death of commissioners, or for any other cause, it become necessary,)

on payment of half the fees usually paid upon obtaining *fiats*; and if any bankrupt die after adjudication, the commissioners may proceed as they might have done if he were living.

(38) Mr. Christian observes, that "the first inquiry is the amount and nature of the petitioning creditor's debt. The petitioning creditor must attend in person before the commissioners, and must specify the time when the debt was contracted, and the particulars of it. The time ought to be specified in the deposition of the witness who proves the act of bankruptcy; for, upon the death of the witness after the proceedings are recorded, the deposition will be evidence in any court of justice. (Doug. 244.)"

[See the 92nd and 96th sections of the statute of 6 Geo. IV. c. 16.—Ed.]

(39) See the stat. s. 22.

nally appointed by the commissioners, and afterwards approved or rejected by the creditors (40): but no creditor shall be admitted to vote in the choice of assignees, whose debt on the balance of accounts does not amount to 10%. And at the third meeting, at farthest, which must be on the forty-second day after the advertisement in the Gazette (unless the time be enlarged by the Lord Chancellor), the bankrupt, upon notice also personally served upon him, or left at his usual place of abode, must surrender himself personally to the commissioners; which surrender (if voluntary) protects him from all arrests till his final examination is past: and he must thenceforth in all respects conform to the directions of the statutes of bankruptcy; or, in default of either surrender or conformity, shall be guilty of felony without benefit of clergy, and shall suffer death, and his goods and estate shall be distributed among his creditors (q) (41).

(q) Stat. 5 Geo. II. c. 50.

(40) See the 45th section of the consolidated bankrupt act.

(41) The rigour of the law as to this matter has been relaxed. By the 112th section of the statute of 6 Geo. IV. c. 16, it is enacted, that a bankrupt not surrendering and submitting to be examined, or not making a discovery of his estate and effects, or not delivering up his effects, and all books and writings relating thereto, or removing, concealing, or embezzling any part of his effects to the value of 10%. with intent to defraud his creditors, shall be deemed guilty of felony, and be liable to be *transported* for life, or for any term not less than seven years, or to be *imprisoned* and kept to hard labour for any term not exceeding seven years.

The 113th section of the statute authorises the Lord Chancellor to enlarge the time for the bankrupt's surrender, so as every order to that effect be made at least six days before the day on which the bankrupt was to surrender himself.

The 115th section of the statute enacts, that, if any bankrupt appre-

hended by any warrant of the commissioners, shall, within the time allowed by the act for him to surrender, submit to be examined, and in all things conform, he shall have the same benefit as if he had voluntarily surrendered.

The 117th section of the statute enacts, that a bankrupt shall be free from arrest or imprisonment by any creditor in coming to surrender, and, after such surrender, during the 42 days regularly allowed for his examination, and such further time as shall be allowed him for finishing his examination, provided he was not in custody at the time of such surrender; and the 118th section authorises the commissioners to adjourn the last examination *sine die*, and that the bankrupt shall be free from arrest or imprisonment for such time, not exceeding three calendar months, as the commissioners shall appoint.

It is to be observed, that the bankrupt laws do not, in this respect, bind the crown; (see, *post*, p. 486;) and a bankrupt is protected from arrest grounded on an *extent*, only whilst he

Bankrupt absconding may be apprehended.

In case the bankrupt absconds, or is likely to run away, between the time of the commission issued, and the last day of surrender, he may by warrant from any judge or justice of the peace be apprehended and committed to the county gaol, in order to be forthcoming to the commissioners; who are also empowered immediately to grant a warrant for seizing his goods and papers (r).

Examination of the bankrupt and others, touching his affairs.

When the bankrupt appears, the commissioners are to examine him touching all matters relating to his trade and effects. They may also summon before them, and examine the bankrupt's wife(s), and any other person whatsoever, as to all matters relating to the bankrupt's affairs. And in case any of them shall refuse to answer, or shall not answer fully, to any lawful question, or shall refuse to subscribe such

In case of refusal to answer, the commissioners may commit the parties.

(r) Stat. 5 Geo. II. c. 30.

(s) Stat. 21 Jac. I. c. 19.

is in actual attendance on the commissioners, and in the execution of his duty of going through his examination. (*Ex parte Temple*, 2 Ves. & Bea. 394.) Still, though the bankrupt statutes do not bind the crown, the general principle of law, according to which witnesses called before a court of justice (and, for this purpose, commissioners of bankrupt are so considered) cannot be arrested during such attendance, extends to the crown as well as to a subject. (*Ex parte Russell*, 19 Ves. 165, and see *infra*.)

The effect of those words of the statute which exempt a bankrupt from arrest upon any "escape warrant," during the time allowed him for finishing his examination, was deliberately considered by Lord Eldon, C., with the assistance of Le Blanc, J., in the case *Ex parte Johnson*, (14 Ves. 41,) and the words in question were held to be applicable to creditors only, not to a gaoler who, without any process, retakes a prisoner who has escaped: independently of any escape warrant, the law considers the prisoner as still in the custody of the gaoler, who may take him where-

ever he finds him: (*Anderson v. Hampton*, 1 Barn. & Ald. 311:) such a case, it was observed, cannot be distinguished from the case of bail, who, it has been long held, are guilty of no contempt of court, although, in discharge of themselves, they surrender a bankrupt during the period allowed for his examination, provided such examination is not actually going on at the very time. (*Ex parte Gibbins*, 1 Atk. 239.)

A creditor attending to prove his debt before the commissioners, or a solicitor attending a bankrupt petition, is entitled to the same privilege of exemption from arrest, not only whilst in actual attendance before the court, but *eundo et redeundo*, *bonâ fide*, therefrom. (*List's case*, 2 Ves. & Bea. 374; *ex parte Bryant*, 1 Mad. 49; *Gascoygne's case*, 14 Ves. 183; *Castle's case*, 16 Ves. 412.) And, as before intimated, any person attending under a summons of the commissioners will be equally protected, (*Ex parte King*, 7 Ves. 312,) both from arrest and subsequent detainers lodged against him. (*Sidgier v. Birch*, 9 Ves. 69.)

their examination, the commissioners may commit them to prison without bail, till they submit themselves and make and sign a full answer; the commissioners specifying in their warrant of commitment the question so refused to be answered. And any gaoler permitting such person to escape or go out of prison, shall forfeit 500*l.* to the creditors (*t*) (42).

(*t*) Stat. 5 Geo. II. c. 30.

(42) The 33d section of the statute of 6 Geo. IV. c. 16, authorises the commissioners to summon and enforce the attendance of any person suspected of having in his possession any part of any bankrupt's estate, or who is supposed to be indebted to the bankrupt, or to be capable of giving information concerning the person, trade, dealings, or estate of such bankrupt, or concerning any act of bankruptcy committed by him; and the commissioners are empowered to require the person so summoned to produce any writings or documents in his power, which the commissioners may think necessary to the verification of the deposition of such person, or to the full disclosure of any of the matters which the commissioners are authorised to inquire into. And the 34th section enacts, that the commissioners may examine any person so summoned, or any person present at any of their meetings, upon oath, concerning the person, trade, dealings, or estate of the bankrupt, or concerning any act of bankruptcy by him committed; and may reduce into writing the answers of every such person, which writing he must sign; and if any such person refuses to be sworn, or to answer any lawful questions touching any of the matters aforesaid, or shall not fully answer to the satisfaction of the commissioners, or shall refuse to sign his examination, or shall not produce any documents in his custody, relating to any of the matters aforesaid, which documents

he has been desired to produce, and to the production of which he has not stated some objection allowed by the commissioners, such person may be by them committed to prison. The 35th section enacts, that every person summoned to attend before the commissioners shall have his costs and expenses. The 36th section authorises the commissioners to summon any bankrupt before them, and to enforce his attendance, whether such bankrupt shall have obtained his certificate or not, and to examine him touching all matters relating either to his trade, dealings, or estate, or which may tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money, or debts, and to reduce his answers into writing, which examination the bankrupt must sign; and if such bankrupt refuses to be sworn, or to answer any questions put to him touching any of the matters aforesaid, or shall not fully answer to the satisfaction of the commissioners any such questions, or shall refuse to sign his examination, (not having any lawful objection, allowed by the commissioners,) he may be committed to prison until he yields compliance. The 37th section enables the commissioners to summon and enforce the attendance of any bankrupt's wife, and to examine her for the finding out and discovery of the estate, goods, and chattels of such bankrupt, concealed, kept or disposed of by such wife in her own person, or by her own act, or by any other per-

Bankrupt concealing effects guilty of felony.

The bankrupt, upon this examination, is bound upon pain of death (43) to make a full discovery of all his estate and effects, as well in expectancy as possession, and how he has disposed of the same; together with all books and writings relating thereto: and is to deliver up all in his own power to the commissioners (except the necessary apparel of himself, his wife, and his children); or, in case he conceals or embezzles any effects to the amount of 20*l.*, or withholds any books or writings, with intent to defraud his creditors, he shall be guilty of felony without benefit of clergy; and his goods and estates shall be divided among his creditors (*u*). And unless it shall appear that his inability to pay his debts arose from some casual loss, he may, upon conviction by indictment of such gross misconduct and negligence, be set upon the pillory for two hours, and have one of his ears nailed to the same and cut off (*v*).

Reward to persons discovering a bankrupt's concealed property.

After the time allowed to the bankrupt for such discovery is expired, any other person voluntarily discovering any part of his estate, before unknown to the assignees, shall be entitled to *five per cent.* out of the effects so discovered, and such farther reward as the assignees and commissioners shall think proper. And any trustee wilfully concealing the estate of any bankrupt, after the expiration of the two and forty days, shall forfeit 100*l.* and double the value of the estate concealed, to the creditors (*w*) (44).

Penalty on a trustee for concealing bankrupt's estate.

(*u*) Stat. 5 Geo. II. c. 30. By the laws of Naples, all fraudulent bankrupts, particularly such as do not surrender themselves within four days, are punished with death; also all who conceal the effects of a bankrupt, or

set up a pretended debt to defraud his creditors. (Mod. Un. Hist. xxviii. 320.)

(*v*) Stat. 21 Jac. I. c. 19.

(*w*) Stat. 5 Geo. II. c. 30.

son, and to deal with her as with any other witness. And the 38th section subjects to a forfeiture of 500*l.* any gaoler who suffers any bankrupt or other person committed to his custody by the commissioners to escape.

(43) These offences are no longer capital; see, *ante*, the notes to p. 472, and also note (41) to p. 481, citing the 112th section of the consolidated bankrupt act. The amount of embezzlement which now subjects a bankrupt to the mitigated punish-

ment of transportation, is fixed at 10*l.* If bankrupts ever were put into the pillory for mismanagement of their affairs, they are no longer subject to such punishment; the statute of 56 Geo. III. c. 138, abolishes that mode of punishment in all cases except those specified in the said act, that is, in cases of perjury, or subornation of perjury.

(44) The 120th section of the statute of 6 Geo. IV. c. 16, embodies the substance of this paragraph of the text.

Hitherto, every thing is in favour of the creditors; and the law seems to be pretty rigid and severe against the bankrupt; but, in case he proves honest, it makes him full amends for all this rigour and severity. For, if the bankrupt hath made an ingenuous discovery (of the truth and sufficiency of which there remains no reason to doubt), and hath conformed in all points to the directions of the law; and if, in consequence thereof, the creditors, or four parts in five of them in number and value (45), (but none of them creditors for less than 20*l.*,) will sign a certificate to that purport; the commissioners are then to authenticate such certificate under their hands and seals, and to transmit it to the Lord Chancellor: and he, or two of the judges whom he shall appoint, on oath *made by the bankrupt that such certificate was obtained without fraud, may allow the same; or disallow it, upon cause shown by any of the creditors of the bankrupt (x) (46).

On full discovery and surrender, bankrupt may obtain a certificate of conformity.

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(x) Stat. 5 Geo. II. c. 30.

(45) Or, after six calendar months from the last examination of the bankrupt, then either by *three fifths in number and value* of such creditors, or by *nine tenths in number*. (122d section of the statute of 6 Geo. IV. c. 16.)

(46) The 124th section of the statute of 6 Geo. IV. c. 16, enacts, that the commissioners shall not sign any certificate unless they have proof of the signature of the creditors thereto, or of persons duly authorised by such creditors; and the proofs of such signature must be laid before the Lord Chancellor, with the certificate, previous to the allowance thereof.

The certificate of the commissioners, that the bankrupt has in all respects conformed himself to the directions of the statute, must be before the court, sitting in bankruptcy, previously to any discussion of the propriety of the Lord Chancellor's allowance of the certificate. But, it is not a necessary consequence, that because the commissioners have been satisfied, the holder of the great seal must be so

likewise: if circumstances justify a suspicion that the bankrupt has not made a full discovery, his certificate will be stayed; (*Ex parte Bangley*, 17 Ves. 118;) and the commissioners may be directed to review their judgment. (*Ex parte King*, 15 Ves. 129.) Still, as the commissioners have, to a certain extent, an independent judicial character, (*Ex parte Linthwaite*, 16 Ves. 236,) delicacy will be felt as to controlling their discretion, whether as to granting or refusing their certificate of conformity; though they cannot properly refuse it, unless, under the sanction of their oath, they believe there is reason to suspect that the bankrupt has not made that discovery which, according to the statute, he ought to make. (*Ex parte King*, 11 Ves. 420; *ex parte Oliver*, 2 Ves. & Bea. 251.) A bankrupt's right to his certificate is not to be made dependent upon his conduct antecedently to his bankruptcy: if, whilst a bankrupt, he has acted as a bankrupt ought, neither the commissioners, nor even the Lord Chancellor,

If no cause shown, certificate allowed of course; and bankrupt entitled to an allowance in certain cases.

If no cause be shown to the contrary, the certificate is allowed of course; and then the bankrupt is entitled to a decent and reasonable allowance out of his effects, for his future support and maintenance, and to put him in a way of

have any right to examine his previous conduct, and on the ground of its impropriety to withhold the certificate. (*Ex parte Gardner*, 1 Ves. & Bea. 47; *ex parte Joseph*, 18 Ves. 342.)

The 130th section of the statute enacts, that no bankrupt shall be entitled to his certificate, or to any allowance, but his certificate, if obtained, shall be void, if such bankrupt has lost, by any sort of gaming, in one day, 20*l.*, or within one year next preceding his bankruptcy, 200*l.*, or if he has within the last-mentioned time lost 200*l.* by stock-jobbing: or if he has, after an act of bankruptcy committed, or in contemplation of bankruptcy, destroyed, altered, mutilated, or falsified, any of his books, papers, writings, or securities, or caused any such acts to be done; or if he has made or been privy to the making of any false or fraudulent entries in any book of account or other document, with intent to defraud his creditors; or if he has concealed property to the value of 10*l.*, or if he has not disclosed, within one month, his knowledge that a false debt has been proved under the *fiat*.

But, if the affidavits, or other evidence, setting forth the violation of the law in any of these respects, be so contradictory as not to establish, distinctly, what the fact really is; to refuse the certificate would be to refuse the bankrupt a trial of the fact by a jury, of which he ought to have the benefit. (*Ex parte Kennet*, 1 Ves. & Bea. 194.) When the certificate is granted, it may still be avoided, if just grounds for doing so exist; (*Hughes v. Morley*, 1 Barn. & Ald.

26;) or the bankrupt may be open to an indictment for perjury, or for conspiracy.

The judicial construction put on the enactment imposing penalties upon concealment of property, refers it to concealment undetected at the time of signing the certificate: if, with full knowledge of the fact, the commissioners have thought fit, upon a proper atonement being made, to sign the certificate, it has been held, that it ought not to be stayed. (*Ex parte Bryant*, 1 Glyn & Jameson, 206.)

If the signature of a single creditor is purchased, the certificate is avoided, though the bankrupt may have been totally ignorant of the transaction: (*Ex parte Butt*, 10 Ves. 360; *ex parte Hall*, 17 Ves. 63;) and any contract or security made or given to induce creditors to sign, is declared void by the 125th section of the statute; and whenever fraud in obtaining a certificate is clearly brought home to a bankrupt, such certificate, though after allowance, will be recalled; (*Ex parte Cawthorne*, 19 Ves. 260;) provided such revocation will affect the bankrupt only; but not if such revocation will operate injustice, or hardship, to innocent persons who have dealt with the party on the faith of his certificate. (*Ex parte Tallis*, 1 Ball & Beat. 322; *ex parte Reed*, Buck, 430.) In all cases where it is sought to have a certificate recalled, the grounds of the application must be fully established, or the petition will be dismissed with costs. (*Ex parte Hood*, 1 Glyn & Jameson, 221; *ex parte Wright*, Ibid. 353; *ex parte Boyle*, Buck, 248; *ex parte Levi*, Buck, 77.)

honest industry. This allowance is also in proportion to his former good behaviour, in the early discovery of the decline of his affairs, and thereby giving his creditors a larger dividend. For, if his effects will not pay one half of his debts, or ten shillings in the pound, he is left to the discretion of the commissioners and assignees, to have a competent sum allowed him, not exceeding *three per cent.*; but if they pay ten shillings in the pound, he is to be allowed *five per cent.*; if twelve shillings and sixpence, then *seven and a half per cent.*; and if fifteen shillings in the pound, then the bankrupt shall be allowed *ten per cent.*: provided that such allowance do not, in the first case, exceed 200*l.*, in the second, 250*l.*, and in the third, 300*l.* (y) (47).

Besides this allowance, he has also an indemnity granted him, of being free and discharged for ever from all debts owing by him at the time he became a bankrupt; even though judgment shall have been obtained against him, and he lies in prison upon execution for such debts; and, for that, among other purposes, all proceedings on commissions of bankrupt are, on petition, to be entered of record, as a perpetual bar against actions to be commenced on this account: though, in general, the production of the certificate, properly allowed, shall be sufficient evidence of all previous proceedings (z). Thus, *the bankrupt becomes a clear man again (48): and, by the assistance of his allowance and his

By the certificate, the bankrupt is discharged from all debts owing by him at the time he became bankrupt.

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(y) Stat. 5 Geo. II. c. 30. By the Roman law of cession, if the debtor acquired any considerable property subsequent to the giving up of his all, it was liable to the demands of his creditors. (Ff. 42. 3, 4.) But this did not extend to such allowance as was left to him on the score of compassion for the maintenance of himself

and family. *Si quid misericordiae causa ei fuerit relictum, puta menstruum vel annuum, alimentorum nomine, non oportet propter hoc bona ejus iterato venundari: nec enim fraudandus est alimentis cottidianis.* (Ibid. l. 6.)

(z) Stat. 5 Geo. II. c. 30.

(47) The 128th section of the statute so often referred to on this subject, embodies the substance of the text, with this variation only, that the allowance to a creditor who pays ten shillings in the pound, or upwards, may now be made to the amount of 400*l.*, and the allowance to a bankrupt who pays twelve shillings and sixpence in the pound, may amount

to 500*l.*, and the allowance to a bankrupt who pays fifteen shillings in the pound, may amount to 600*l.*; and a discretionary allowance to a bankrupt who does not pay ten shillings in the pound, may be given to the amount of 300*l.*

(48) See *ante*, p. 472, note. The 121st section of the statute of 6 Geo. IV. c. 16, enacts, that a bankrupt

own industry, may become a useful member of the commonwealth; which is the rather to be expected, as he cannot be entitled to these benefits, unless his failures have been owing to misfortunes, rather than to misconduct and extravagance.

Where bankrupt not entitled to allowance.

For, no allowance or indemnity shall be given to a bankrupt, unless his certificate be signed and allowed, as before mentioned; and also, if any creditor produces a fictitious debt, and the bankrupt does not make discovery of it, but suffers the fair creditors to be imposed upon, he loses all title to these advantages^(a). Neither can he claim them if he has given with any of his children above 100*l.* for a marriage portion, unless he had at that time sufficient left to pay all his debts; or, if he has lost at any one time 5*l.*, or in the whole, 100*l.* within a twelvemonth before he became bankrupt, by any manner of gaming or wagering whatsoever; or within the same time has lost to the value of 100*l.* by stock-jobbing (49). Also, to prevent the too common practice of frequent and fraudulent or careless breaking, a mark is set upon such as have been once cleared by a commission of bankrupt, or have compounded with their creditors, or have been delivered by an act of insolvency: which is an occasional act, frequently passed by the legislature: whereby all persons whatsoever, who are either in too low a way of dealing to become bankrupts, or not being in a mer-

In case of a second bankruptcy.

(a) Stat. 24 Geo. II. c. 57.

who has in all things conformed to the bankrupt laws, and obtained his certificate, shall be discharged from all debts due by him when he became bankrupt, and from *all claims and demands proveable under the fiat*; and the 131st section enacts, that no promise, after the certificate allowed, to pay any debt discharged by such certificate, shall be binding, unless such promise be made in writing, signed by the bankrupt, or by some person lawfully authorised, in writing, by such bankrupt.

(49) In the last note but two, the 130th section of the consolidated bankrupt act is cited, which makes

an alteration as to the amount of gambling losses which will deprive a bankrupt of the advantages of a certificate or allowance. It appears, also, from the 73rd section of the same act, that portions given by a trader to any of his children upon their marriage, though such portions exceeded 100*l.* and he was at the time insolvent, cannot be recalled upon his bankruptcy; and that part of the 12th section of stat. 5 Geo. II. c. 30, which deprived a bankrupt, who had given such portion, of the benefits of a certificate, is not retained in the recent act.

cantile state of life, are not included within the laws of bankruptcy, are discharged from all suits and imprisonment, upon delivering up all their estate and effects to their creditors upon oath, at the sessions or assizes; in which case their perjury or fraud is usually, as in case of bankrupts, punished with death. Persons who have been once cleared by any of these methods, and afterwards become bankrupts again, unless they pay full *fifteen shillings in the pound, [*485] are only thereby indemnified as to the confinement of their bodies; but any future estate they shall acquire remains liable to their creditors, excepting their necessary apparel, household goods, and the tools and implements of their trades(b)(50).

(b) Stat. 5 Geo. II. c. 30.

(50) The 127th section of the statute of 6 Geo. IV. c. 16, does not merely make such future estate *liable* to such bankrupt's creditors, but absolutely *vests* it in the assignees under their *fiat*, who are authorised to seize the same, in like manner as they might have seized property of which such bankrupt was possessed at the issuing of the *fiat* against him.

It may be here observed, to close this branch of the subject, that, by the 50th section of the same act, mutual debts and credits may be set off against each other, notwithstanding any prior act of bankruptcy committed before the credit given to, or the debt contracted by, the bankrupt; provided the person claiming the benefit of such set off had not, when such credit was given, notice of the act of bankruptcy. By the 51st section of the act, debts which were not payable at the time of the bankruptcy may be proved, deducting a rebate of interest, at the rate of 5 *per cent.* to be computed from the declaration of a dividend to the time when such debt would regularly have become payable. The 52nd section of the statute enables sureties and persons liable for the debts of bankrupts, after

they have discharged the debts, to prove their demands in respect of such payments, as debts under the *fiats*, and to receive dividends with the other creditors, not disturbing any former dividends.

The 53rd section contains a proviso for proof by an obligee in a bottomry or *respondentia* bond, and the assured in any policy of insurance, though the loss or contingency may have happened after the issuing of the *fiat* against the obligor or insurer. The 54th section of the act admits annuity creditors to prove for the actual value of their annuities, such value to be ascertained by the commissioners. The 55th section provides, that, until the value of an annuity granted by a bankrupt shall have been so ascertained as aforesaid, the grantor shall not be allowed to sue any collateral surety for the payment of such annuity; (this clause, it has been held, applies to annuities granted before the passing of the act, as well as to those granted since. *Bell v. Bilton*, 1 B. Moore & Payne, 582;) and if the surety pay the amount so ascertained and proved under the *fiat*, he shall thereby be discharged from all claims in respect of such annuity: but, if such surety

Thus much for the proceedings on a commission of bankrupt, so far as they affect the bankrupt himself personally. Let us next consider,

4. In what manner an estate in goods and chattels may be transferred by bankruptcy.

4. How such proceedings affect or transfer the *estate* and *property* of the bankrupt. The method whereby a *real* estate, in lands, tenements, and hereditaments, may be transferred by bankruptcy was shown under its proper head in a former chapter (c) (51). At present, therefore, we are only to consider the transfer of things *personal* by this operation of law.

By the act of bankruptcy, all the personal estate of the bankrupt, whether in *possession* or in *action*, is vested in his assignees.

By virtue of the statutes before mentioned (d), all the *personal estate* and effects of the bankrupt are considered as *vested*, by the act of bankruptcy, in the future *assignees* of his commissioners (52), whether they be goods in actual *possession*, or debts, contracts, and other choses in *action*: and the commissioners by their warrant may cause any house or tenement of the bankrupt to be broken open, in order to enter upon and seize the same. And when the assignees are chosen or approved by the creditors, the commissioners are to assign every thing over to them; and the property of every part of

(c) Pag. 285.

(d) Stat. 1 Jac. I. c. 15; 21 Jac. I. c. 19.

shall not pay the sum so proved, he may be sued for the accruing payments of the annuity, until he shall have satisfied the amount so proved, with interest thereon, at the rate of 4 *per cent.* from the time of notice of such proof; and after such satisfaction, the surety shall stand in the place of the annuitant in respect of such proof, and the certificate of the bankrupt shall be a discharge to him from all claims of such annuitant or of such surety in respect of such annuity. The 56th section of the statute enacts, that debts which are contingent at the time of the debtor's bankruptcy, may, if the creditor wishes it, be valued by the commissioners, and proof shall be admitted to the amount so ascertained, and dividends be payable thereon; or, if such value shall not be ascertained before the contingency happens, the creditor may prove in respect of the entire debt, and re-

ceive dividends thereon, not disturbing former dividends; provided the creditor had not, when such debt was contracted, notice of any act of bankruptcy by the bankrupt committed. The 75th section of the act relieves a bankrupt entitled to a lease, which the assignees accept, from all liability to pay any rent accruing after the date of the *fiat*, or to be sued in respect of any subsequent non-observance or the non-performance of the covenants contained in such lease; and, if the assignees decline to accept the same, the bankrupt will still be released from the said liabilities, in case he deliver up the lease to the lessor within fourteen days after he shall have had notice that the assignees have declined to accept the same.

(51) And see the late stat. s. 26.

(52) See the late stat. s. 25.

the estate is thereby as fully vested in them, as it was in the bankrupt himself, and they have the same remedies to recover it(e).

The property vested in the assignees is the whole that the bankrupt had in himself, at the time he committed the first act of bankruptcy, or that has been vested in him since, before his debts are satisfied or agreed for. Therefore, it is usually said, that once a bankrupt, and always a bankrupt; by which is meant, that a plain direct act of bankruptcy once *committed cannot be purged, or explained away, by any subsequent conduct, as a dubious equivocal act may be(f); but that, if a commission is afterwards awarded, the commission and the property of the assignees shall have a relation, or reference, back to the first and original act of bankruptcy(g). Insomuch that all transactions of the bankrupt are from that time absolutely null and void, either with regard to the alienation of his property, or the receipt of his debts from such as are privy to his bankruptcy; for they are no longer his property, or his debts, but those of the future assignees. And if an execution be sued out, but not served and executed on the bankrupt's effects, till after the act of bankruptcy, it is void as against the assignees(53). But the king is not bound by this fictitious relation, nor is he within the statutes of bankrupts(h); for, if, after the act of bankruptcy committed, and before the assignment of his effects, an extent issues for the debt of the crown, the goods are bound thereby(i)(54). In France, this doctrine of relation is carried to a very great length; for there, every act

The title of the assignees has relation back to the time of the act of bankruptcy.

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Execution not executed until after an act of bankruptcy, though sued out before, is void as against the assignees.

(e) 12 Mod. 324.

(f) Salk. 110.

(g) 4 Burr. 32.

(h) 1 Atk. 262.

(i) Viner, Abr. t. *Creditor & Bankrupt*, 104.

(53) If a sheriff take goods in execution after an act of bankruptcy committed by the party against whom the execution is sued out, it has been held, that the sheriff is liable to the assignees, in *trover*, although he had no notice of the act of bankruptcy, and although the *fiat* did not issue until nearly two months after the execution. (*Price v. Helyar*, 1 B. Moore & Payne, 552.)

(54) The king is not bound by the acts relating to bankrupts, not being

named therein; (*Audley v. Halsey*, W. Jones, 203; *Brassey v. Dawson*, 2 Str. 982; and see *ante*, p. 481, note;) and, by virtue of the prerogative, if a debtor to the crown become a bankrupt, and a *fiat* be sued out against him, and an assignment made of his estate; an extent issued for the crown, and tested the day of the date of the assignment, will be preferred: (*Rogers v. Mackenzie*, 4 Ves. 752; *the King v. Crump and Hanbury*, cited in Park. 127, and in

of a merchant, for ten days *precedent* to the act of bankruptcy, is presumed to be fraudulent, and is therefore void(*k*). But with us the law stands upon a more reasonable footing: for, as these acts of bankruptcy may sometimes be secret to all but a few, and it would be prejudicial to trade to carry this notion to its utmost length, it is provided by statute 19 Geo. II. c. 32, that no money paid by a bankrupt to a *bonâ fide* or real creditor, in a course of trade,

(*k*) Sp. L. b. 29, c. 16.

2 Show. 481 :) to prevent which sweeping away of the whole estate by the crown, a *fiat* of bankruptcy has frequently been sealed at midnight. (*Wydown's case*, 14 Ves. 87.) The crown not only has the priority above mentioned, but is not subject to the equity of being bound to use its securities against parties primarily liable in behalf of those secondarily liable. (*Whitehouse v. Partridge*, 3 Swanst. 376, 378.) The affidavit, therefore, upon which an order for an extent, which has such sweeping consequences, is grounded, ought to be unequivocal; it may not be improper for a Baron of the Exchequer, even when he feels some doubt upon the subject, to give his preliminary *fiat* for an extent, because the issuing the writ only enables the crown to lay its hands upon the property, and does not prevent any other proper claims from being put on the record and fully discussed; but, if upon such discussion the affidavit should be determined by the court not to be sufficiently positive and distinct, the extent will be set aside: (*The King v. Marsh*, M'Clel. 701 :) and there may be cases in which the court will receive and examine counter-affidavits, in order to determine whether an extent issued properly. (*Phillips v. Shaw*, 8 Ves. 252.) If, upon examination, an extent is set aside for irregularity, and the effects are ordered to be delivered up to the assignees of the debtor,

duly appointed under a *fiat* of bankruptcy; a second extent, tested the same day on which the first was set aside, and delivered to the sheriff before the execution of the order for delivery of the goods to the assignees, will give the crown no *lien* on the effects, but the assignees will be entitled to reduce them into possession. (*The King v. Marsh*, M'Clel. & Younge, 257.)

And the 71st section of the consolidated bankrupt act enacts, that, if any real or personal estate or debts of any bankrupt be extended after he shall have become bankrupt, under pretence of his being indebted to an accountant of, or debtor to, the king, upon some contract originally made between such accountant and the bankrupt, the commissioners may examine upon oath whether such was the fact, and if such contract was originally made with any other person than the said accountant, or with him, but in trust for any other person, the commissioners may sell and dispose of such real and personal estate for the benefit of the creditors under the *fiat*, and such sale shall be valid against the said extent and all persons claiming under it; and any person to whom the said real and personal estate shall be bargained, sold, granted, or assigned by the commissioners, shall have, and may recover, the same against any person who shall detain the same.

even after an act of bankruptcy done, shall be liable to be refunded. Nor, by statute 1 Jac. I. c. 15, shall any debtor of a bankrupt, that pays him his debt, without knowing of his bankruptcy, be liable to account for it again. The intention of this relative power being only to reach fraudulent transactions, and not to distress the fair trader (55).

Payments made to creditors *bona fide*, and without knowledge of the act of bankruptcy.

The assignees may pursue any *legal* method of recovering this property so vested in them, by their own authority; but *cannot commence a suit in *equity*, nor compound any debts owing to the bankrupt, nor refer any matters to arbitration, without the consent of the creditors, or the major part of them in value, at a meeting to be held in pursuance of notice in the Gazette (l) (56).

Power of assignees to sue, &c.

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(l) Stat. 5 Geo. II. c. 30.

(55) The 81st section of the statute of 6 Geo. IV. c. 16, enacts, that all conveyances by, and all contracts and other dealings and transactions by and with any bankrupt, *bona fide* made and entered into more than two calendar months before the issuing of the *fiat* against him, and all executions and attachments against the tenements or chattels of such bankrupt, *bona fide* executed or levied more than two months before the issuing of such *fiat*, shall be valid, notwithstanding any prior act of bankruptcy by him committed: provided the persons so dealing with the bankrupt had not at the time of such conveyance, contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, *notice* of any prior act of bankruptcy by him committed. And the 86th section of the statute enacts, that no purchase from any bankrupt *bona fide* and for a valuable consideration, where the purchaser *had notice* at the time of such purchase of an act of bankruptcy by such bankrupt committed, shall be impeached by reason thereof, unless the *fiat* against such bankrupt shall have been sued out within twelve calendar months after such act of bankruptcy.

By the 82nd section of the statute it is enacted, that all payments really and *bona fide* made by a bankrupt, before the date and issuing of the *fiat* against him (such payments by the bankrupt not being a fraudulent preference of the creditors to whom they are made), shall be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and all payments really and *bona fide* made to a bankrupt before the issuing of the *fiat* against him, shall be also valid, notwithstanding any prior act of bankruptcy by him committed: and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the bankrupt had not, at the time of such payment by or to the bankrupt, notice of any act of bankruptcy by such bankrupt committed.

(56) If, after such notice given, creditors whose debts amount to one third in value of the whole sum proved under the *fiat* do not attend the meeting, the assignees are empowered by the 88th section of the statute of 6 Geo. IV. c. 16, to do any of the acts specified in the text above, the commissioners giving their consent in writing.

Declaring a first dividend.

Mortgages.

Pledges.

When they have got in all the effects they can reasonably hope for, and reduced them to ready money, the assignees must, after four and within twelve months after the commission issued, give one and twenty days' notice to the creditors of a meeting for a dividend or distribution; at which time they must produce their accounts, and verify them upon oath, if required. And then the commissioners shall direct a dividend to be made, at so much in the pound, to all creditors who have before proved, or shall then prove, their debts(57). This dividend must be made equally, and in a rateable proportion, to all the creditors, according to the *quantity* of their debts; no regard being had to the *quality* of them. Mortgages, indeed, for which the creditor has a real security in his own hands, are entirely safe; for the commission of bankrupt reaches only the equity of redemption(*m*). So are also personal debts, where the creditor has a chattel in his hands, as a pledge or pawn for the payment, or has taken the debtor's lands or goods in execution(58)(59). And, upon the equity of the statute 8 Ann.

(*m*) Finch, Rep. 466.

(57) The 106th section of the statute of 6 Geo. IV. c. 16, enacts, that the commissioners shall appoint a public meeting, not sooner than four calendar months from the date of the *fiat*, nor later than six calendar months from the last examination of the bankrupt, for the purpose of auditing the accounts of the assignees: and the 107th section enacts, that the commissioners shall, not sooner than four nor later than twelve calendar months from the issuing the *fiat*, appoint a public meeting to make a dividend of the bankrupt's estate, at which meeting all creditors who have not proved their debts shall be entitled to prove the same; and the commissioners shall then order such a dividend as they see fit to be made, and the assignees shall forthwith make such dividend; but no dividend shall be declared, unless the accounts of the assignees shall have been first audited as aforesaid.

(58) The 108th section of the statute of 6 Geo. IV. c. 16, enacts, that no creditor having any security for his debt; or having made any attachment *in London*, or any other place, by *virtue of any custom* there used, of the goods and chattels of a bankrupt; shall receive upon any such security or attachment more than a rateable part of such debt; except in respect of any execution or extent served and levied by seizure upon, or any mortgage of or lien upon, any part of the property of such bankrupt before the bankruptcy: provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of *such* execution to the prejudice of other fair creditors, but shall be paid rateably with such creditors. The execution, however, will not be set aside, but will stand for the benefit of all the credi-

c. 14) (which directs, that, upon all executions of goods Bankrupt's landlord allowed

tors rateably: (*Taylor v. Taylor*, 5 Barn. & Cress. 394; 8 D. & R. 162;) and this rateable distribution will be enforced at common law, without putting the parties interested to the extraordinary remedy of a court of equity. (*Mitchell v. Knott*, 1 Simons, 499.) The case of a creditor who obtained judgment before his debtor's bankruptcy, and who does not come in under his *fiat*, is left as it was before the passing of the act. (*Ex parte Botcherley*, 2 Glyn & Jameson, 370.)

The Court of Bankruptcy exercises (with caution) a discretionary power of ordering a value to be put upon a security held by a creditor; instead of directing a sale. (*Ex parte Smith*, 1 Ves. & Bea. 521.) If a creditor, as an additional security for his debt, has taken the bankrupt's acceptances; it is his duty, when he comes to prove his debt, to produce the securities, if they are in his power; and if they are not, to state the fact to the commissioners: otherwise, he might himself prove for the full amount of his debt, leaving the holders of the outstanding bills to come in afterwards and prove upon such bills; thus exposing the estate to a double proof. (*Ex parte Hossack*, Buck, 392.) And where bankers have given their acceptances, on the security of promissory notes delivered to them by a trader who becomes bankrupt, the debt may be proved under the *fiat*, but the court will require that the bankers should take up their acceptances. (*Ex parte Bloxham*, 8 Ves. 533; *Sarratt v. Austin*, 4 Taunt. 208.)

A creditor who has taken goods of his bankrupt debtor in execution, cannot, whilst those goods remain unsold, come in and prove under the commission: (*Ex parte Hopley*, 1 Jac. & Walk. 423:) the case would be different if the goods were sold;

for then the amount of debt remaining due would be certain. (S. C. 1 Glyn & Jameson, 63; *ex parte Smith*, 2 Rose, 64.) A similar rule applies where the creditor holds a security: it must be given up, or made available as far as possible, before the creditor can prove: if, indeed, a creditor who holds bills or other securities, obtained in the regular course of business, and not handed over with a view to give him a preference, (*Ex parte Barclay*, 1 Glyn & Jam. 279,) will retain such bills at the full amount which they purport to secure, (and they cannot be worth more, but may be worth less,) if that amount be deducted, he may come in and prove for the balance due to him. (*Ex parte De Tastet, Carrol, & Roberts*, 1 Ves. & Bea. 289. And see *Ex parte Greenwood*, Buck, 325.) And a pending execution in respect of a joint debt will not affect a creditor's right to prove a distinct separate debt, under a commission against one of the debtors: (*Ex parte Stanborough*, 5 Mad. 89:) though a creditor who holds a joint and separate security, must, on the bankruptcy of some of the parties responsible, elect whether he will go against the joint estate, or the separate estate of each: (*Ex parte Hay*, 15 Ves. 4; *ex parte Bevan*, 10 Ves. 109:) bare proof against either estate will not conclude his election; but he is bound to make his election before a dividend is declared of the estate against which he has proved. (*Ex parte Husband*, 5 Mad. 421.)

The general rule in bankruptcy, as to proof in respect of bills of exchange, is, that the holder may prove the full amount against the estate of every person who is a debtor upon those bills, with these restrictions, that, if previously to the proof a part of the debt has been recovered from any quarter, the proof can only be for the

one year's rent
in arrear.

being on any premises demised to a tenant, one year's rent, and no more, shall, if due, be paid to the landlord), it hath also been held, that, under a commission of bankrupt, which is in the nature of a statute-execution, the landlord shall be allowed his arrears of rent to the same amount, in preference to other creditors (60), even though he hath neglected to distrain (61), while the goods remained on the premises; which he is otherwise entitled to do for his entire rent, be the *quantum* what it may (*n*) (62). But, otherwise, judgments and recognizances (both which are debts of record, and therefore at other times have a priority), and also bonds and obligations by deed or special instrument (which are

(*n*) 1 Atk. 103, 104.

residue; and that he must not receive more than twenty shillings in the pound from the aggregate of the dividends. (*Ex parte The Bank of Scotland*, 19 Ves. 311; *ex parte Lees*, 6 Ves. 645; *ex parte Bloxham*, 6 Ves. 450, 601.)

When a creditor has proved in respect of several bills of exchange drawn by the bankrupt, and discounted by the creditor, should one of the bills be afterwards paid in full, the proof as to that bill must be expunged: for the law considers each act of discount as a distinct isolated transaction; and though the *form* of proof is upon the whole loan, the proof is, in truth, upon each bill separately. (*Ex parte Barratt*, 1 Glyn & Jameson, 329.)

A creditor who has proved a debt, part of which he was not entitled to prove, will not be allowed to take a dividend before that is set right; and, if he has actually received a dividend, he will be compelled to refund it. (*Ex parte Hilton*, 1 Jac. & Walk. 469.)

(59) Mr. Christian observes, that "where a creditor has a mortgage or pledge, which he thinks insufficient to satisfy the whole of his debt, he may apply to the commissioners, and if they see no objection to the title of

the mortgage they may order it to be sold, and that the produce shall be applied in discharge of the expenses of the sale, and of the mortgagee's debt; and if there be a deficiency, the mortgagee shall be permitted to prove it under the *fiat*. Order March 8th, 1794."

(60) The 74th section of the statute of 6 Geo. IV. c. 16, enacts, that no distress levied after an act of bankruptcy, upon the goods or effects of any bankrupt (whether before or after the issuing of the *fiat*,) shall be available for more than one year's rent, accrued prior to the date of the commission; but the landlord or party to whom the rent shall be due, shall be allowed to come in as a creditor under the *fiat*, for the overplus of the rent due, and for which the distress shall not be available.

(61) Mr. Christian observes, that "Lord Bathurst, Chancellor, declared expressly, that this proposition in the Commentaries was erroneous; and decreed that the landlord, if he has not availed himself of his right to distrain, has no privilege under the bankrupt statutes, but must come in *pari passu* with other creditors for every part of the rent due to him. (Cooke, 222.)"

(62) Not so: see the last note.

called debts by specialty, and are usually the next *in order), these are all put on a level with debts by mere simple contract, and all paid *pari passu*(o). Nay, so far is this matter carried, that, by the express provision of the statutes(p), debts not due at the time of the dividend made, as bonds or notes of hand payable at a future day certain, shall be proved and paid equally with the rest(q), allowing a discount or drawback in proportion. And insurances, and obligations upon bottomry or *respondentia*, *bonâ fide* made by the bankrupt, though forfeited after the commission is awarded, shall be looked upon in the same light as debts contracted before any act of bankruptcy(r)(63).

Within eighteen months after the commission issued, a second and final dividend shall be made, unless all the effects were exhausted by the first(s)(64). And if any surplus

As to second and final dividend.

(o) Stat. 21 Jac. I. c. 19.

(r) Stat. 19 Geo. II. c. 32.

(p) Stat. 7 Geo. I. c. 31.

(s) Stat. 5 Geo. II. c. 30.

(q) Lord Raym. 1549; Stra. 1211.

(63) See *ante*, the note to p. 485.

(64) The 109th section of the statute of 6 Geo. IV. c. 16, enacts, that if a bankrupt's estate shall not have been wholly divided upon the first dividend, the commissioners shall, within eighteen calendar months after the issuing of the *fiat*, appoint a public meeting to make a second dividend, when all creditors who have not proved their debts may prove the same; and such second dividend shall be final, unless any action or suit be depending, or any part of the estate be standing out not sold or disposed of, or unless some other estate or effects of the bankrupt shall afterwards come to the assignees, in which case they shall, as soon as may be, convert such estate and effects into money, and within two calendar months after the same shall be so converted, divide the same.

When the act says, that, for the purpose of making a final dividend, the assignees shall convert the bankrupt's estate into money, "as soon as may be," it seems that this must

be understood to mean, *as soon as it can prudently be done*; for, though Lord Thurlow (in *Ex parte Goring*, 1 Ves. jun. 169,) held that under the old act, a consideration of the imprudence of a hasty sale, or its consequences, would not authorise the court to suspend the sale, yet Lord Eldon over-ruled this opinion, and (in *Ex parte Kendall*, 17 Ves. 519) decided, that it was competent to the court to exercise a sound discretion as to the time when the assets are to be converted into money; and that a different rule would, in many concerns, impose the necessity of ruining the property. His Lordship held, therefore, that the court might suspend a sale of the bankrupt's estate, and consequently postpone a final dividend, when it was satisfied that such a measure would be just to all whom the order would affect; but, the court will require the assignees to make out a clear case, why the dividend should not be made within the time limited by the statute. (*Ex parte Grosvenor*, 14 Ves. 590.)

Upon satisfaction of all debts, the commission may be superseded.

remains, after selling his estates and paying every creditor his full debt, it shall be restored to the bankrupt (*t*). This is a case which sometimes happens to men in trade, who involuntarily, or at least unwarily, commit acts of bankruptcy, by absconding and the like, while their effects are more than sufficient to pay their creditors. And, if any suspicious or malevolent creditor will take the advantage of such acts, and sue out a commission, the bankrupt has no remedy, but must quietly submit to the effects of his own imprudence; except that, upon satisfaction made to all the creditors, the commission may be *superseded* (*u*). This case may also happen, when a knave is desirous of defrauding his creditors, and is compelled by a commission to do them that justice, which otherwise he wanted to evade. And therefore, though the usual rule is, that all interest on debts carrying interest shall cease from the time of issuing the commission, yet, in case of a surplus left after payment of every debt, such interest shall again revive, and be chargeable on the bankrupt (*w*), or his representatives (65).

(*t*) Stat. 13 Eliz. c. 7.

(*u*) 2 Ch. Cas. 144.

(*w*) 1 Atk. 244.

(65) The 132nd section of the statute of 6 Geo. IV. c. 16, enacts, that in case of a surplus after full payment of a bankrupt's debts, the assignees shall pay it to the bankrupt; but such surplus is not to be handed over, until interest upon all the debts proved under the *fiat* has been paid, at the rate and in the order following; that is to say, all creditors whose debts are by law entitled to carry interest, in the event of a surplus, shall first receive interest on such debts, at the rate of interest reserved or payable thereon, to be calculated from the date of the *fiat*; and after such interest

shall have been paid, *all* other creditors who have proved under the commission shall receive interest on their debts from the date of the *fiat*, at the rate of 4*l.* *per cent.*

The 57th section of the same statute enacts, that although interest is not reserved upon a bill of exchange or promissory note overdue at the issuing of a *fiat* of bankruptcy against a party liable upon such bill or note, the holder thereof shall be entitled to prove for interest upon the same, to be calculated to the date of the *fiat*, at the rate of 5*l.* *per cent. per annum.*

CHAPTER XXXII.

OF TITLE BY TESTAMENT, AND
ADMINISTRATION.

THERE yet remain to be examined, in the present chapter, two other methods of acquiring personal estates, *viz.* by *testament* (1) and *administration*. And these I propose to consider in one and the same view; they being in their nature so connected and blended together, as makes it impossible to treat of them distinctly, without manifest tautology and repetition.

XI., XII. In the pursuit then of this joint subject, I shall, first, inquire into the original and antiquity of testaments and administrations; shall, secondly, show who is capable of making a last will and testament; shall, thirdly, consider the nature of a testament and its incidents; shall, fourthly, show what an executor and administrator are, and how they are to be appointed; and, lastly, shall select some few of the general heads of the office and duty of executors and administrators.

First, as to the *original* of testaments and administrations. We have more than once observed, that when property came to be vested in individuals by the right of occupancy (2), it became necessary for the peace of society, that this occupancy should be continued, not only in the present possessor, but in those persons to whom he should think proper to transfer it; which introduced the doctrine and practice of alienations, *gifts, and contracts. But these precautions would be very short and imperfect, if they were confined to

XI. XII. By testament, and administration.

Of the origin of testaments and administrations.

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(1) See *ante*, p. 373.

(2) See *ante*, chapter 1, *passim*, with the notes thereto.

the life only of the occupier ; for then, upon his death, all his goods would again become common, and create an infinite variety of strife and confusion. The law of very many societies has therefore given to the proprietor a right of continuing his property after his death, in such persons as he shall name : and, in defect of such appointment or nomination, or where no nomination is permitted, the law of every society has directed the goods to be vested in certain particular individuals, exclusive of all other persons (*a*) (3). The former method of acquiring personal property, according to the express directions of the deceased, we call a *testament* (4) : the latter, which is also according to the will of the deceased, not expressed indeed but presumed by the law (*b*), we call in England an *administration* (5) ; being the same which the civil lawyers term a succession *ab intestato*, and which answers to the descent or inheritance of real estates.

Their antiquity.

Testaments are of very high antiquity. We find them in use among the ancient Hebrews ; though I hardly think the example usually given (*c*), of Abraham's complaining (*d*) that, unless he had some children of his body, his steward Eliezer of Damascus would be his heir, is quite conclusive (6) to show that he had made him so by *will*. And indeed a learned writer (*e*) has adduced this very passage to prove, that, in the patriarchal age, on failure of

(*a*) Puff. L. of N. b. 4, c. 10.

dolph. Orph. Leg. 1. 1.

(*b*) Ibid. b. 4, c. 11.

(*d*) Gen. c. 15.

(*c*) Barbeyr; Puff. 4, 10, 4 ; Go-

(*e*) Taylor's Elem. Civ. Law, 517.

(3) See *ante*, p. 11, with the notes thereto : and also chapter 23, pp. 373—383, as to devises of real estates.

(4) Provided an *executor* be named therein : this constitutes the distinction between a "testament" and a "last will." (Swinburne, pt. 1, sections 1 & 3.) And this, it seems, is not a mere technical distinction in all cases ; for instance, if a testator, being an inhabitant of the province of York (or other district where the personal estate of an intestate is distributable according to a local custom,) should die, leaving a will, but not having named an executor thereof,

his personal estate, it has been held, must be distributed, as under an intestacy, according to the custom. (*Wheeler v. Sheer*, Mosely, 303 ; and see *Chedron v. Harris*, Noy, 12, Brooke's Ab. tit. *Testament*, 20.) But, where no particular local custom comes in question, there is no doubt that a will is good in equity, though the testator has named no executor. (*Wyrall v. Hall*, 2 Cha. Rep. 112 ; Swinb. pt. 1, sect. 6 ; and see *post*, 503.)

(5) See *post*, p. 496.

(6) See *ante*, p. 12, note ; and Turnbull's Note to Heineccius, book 1, chap. 11, sect. 291.

children, or kindred, the servants born under their master's roof succeeded to the inheritance as heirs-at-law (*f*). But (to omit what Eusebius and others have related of Noah's testament, made in *writing* and witnessed under his *seal*, whereby he disposed of the whole world (*g*),) I apprehend that a much more authentic instance of the early use of testaments may be found in the sacred writings (*h*), wherein Jacob bequeaths to his son Joseph a portion of his *inheritance double to that of his brethren: which will we find carried into execution many hundred years afterwards, when the posterity of Joseph were divided into two distinct tribes, those of Ephraim and Manasseh, and had two several inheritances assigned them; whereas the descendants of each of the other patriarchs formed only one single tribe, and had only one lot of inheritance. Solon was the first legislator that introduced wills into Athens (*i*); but in many other parts of Greece they were totally discountenanced (*k*). In Rome they were unknown, till the laws of the twelve tables were compiled (7), which first gave the right of be-

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(*f*) See pag. 12.(*g*) Selden, de succ. Ebr. c. 24.(*h*) Gen. c. 48.(*i*) Plutarch. in vita Solon.(*k*) Pott. Antiq. l. 4, c. 15.

(7) This position is very questionable. Long before the compilation of the laws of the Twelve Tables, a testament might be made by a Roman, and his private will converted into a public law, by promulgation in *calatis comitiis*. A Roman also who was *girt* for war, and about to proceed to battle, was allowed, antecedently to the laws of the Twelve Tables, to make what was termed *testamentum in procinctu*. And a third mode of making a will, without the formality of ratification by the *comitia*, and by persons who were not entitled to the exclusively military privilege of making *testamentum procinctum*, was in use before the introduction of the laws of the Twelve Tables:—this was by means of a fictitious purchase by the intended inheritor, to whom the purchase money was tendered, and weighed in a balance, before witnesses: which was

termed *testamentum per æs et libram*.

“*Sciendum est, olim quidem duo genera testamentorum in usu fuisse; quorum altero in pace et otio utebantur, quod calatis comitiis appellabant; altero, cum in prælium exituri essent, quod procinctum dicebatur. Accessit deinde tertium genus testamentorum, quod dicebatur per æs et libram, scilicet quod per emancipationem, id est, imaginariam quandam venditionem agebatur, quinque testibus et libripende civibus Romanis puberibus præsentibus, et eo qui familiæ emptor dicebatur. Sed illa quidem priora duo genera testamentorum ex veteribus temporibus in desuetudinem abierunt: quod vero per æs et libram fiebat, diutius permanserit.*” (Vinnius, lib. 2, tit. 10.) Heineccius, in his commentary on this passage, observes, that the *comitia*, which were *calata*, or *convocata*, for the purpose of giving

queathing (*l*): and, among the northern nations, particularly among the Germans (*m*), testaments were not received into use. And this variety may serve to evince, that the right of making wills, and disposing of property after death, is merely a creature of the civil state (*n*)(8); which has permitted it in some countries, and denied it in others: and, even where it is permitted by law, it is subjected to different formalities and restrictions in almost every nation under heaven (*o*) (9).

Of the distribution of a deceased's property before the conquest.

With us in England this power of bequeathing is coeval with the first rudiments of the law: for we have no traces or memorials of any time when it did not exist (10). Mention is made of intestacy, in the old law before the conquest, as being merely accidental; and the distribution of the intestate's estate, after payment of the lord's heriot, is then directed to go according to the established law. "*Sive quis incuria, sive morte repentina, fuerit intestatus mortuus, dominus tamen nullam rerum suarum partem (præter eam quæ jure debetur hereoti nomine) sibi assumito. Verum possessiones uxori, liberis, et cognatione proximis, pro suo cuique jure, distribuantur*" (*p*). But we are not to ima-

(*l*) Inst. 2, 22, 1.

(*m*) Tacit. de mor. Germ. 21.

(*n*) See page 13.

(*o*) Sp. L. b. 27, c. 1; Vinnius in Inst. l. 2, tit. 10.

(*p*) LL. Canut. c. 68.

a public sanction to private wills, could neither have been the *comitia centuriata*, nor the *comitia tributa*, but must necessarily have been the *comitia curiata*, *quæ sola, primis temporibus, cum in concione testamenta fiebant, in urbe haberentur. Certum est tempore mediæ jurisprudentiæ comitiis testari desitum fuisse. Immo, latis tabulis xii. desiisse testamenta in comitiis calatis fieri, verisimillimum est. Quis enim voluisset voluntatem suam submittere populi suffragiis, quum libere suoque arbitrio testari posset? Et quis maluisset publice et palam hæredem nuncupare, quam jure uti xii. tabularum concessio?*

(8) But see *ante*, pp. 11, 12, 13, with the notes.

(9) See Vol. I. p. 7.

(10) Mr. Roberts, in his treatise on "the law of wills" (Vol. I. pp. 3—6) agrees with our author that, with respect to moveables, the testamentary power seems to have been exerciseable in this country in a very remote period; but he seems to doubt whether the power of disposing of land by will was exercised by our early Anglo-Saxon ancestors. There is sufficient evidence, however, that, before the Norman conquest, lands were devisable by will; though, whether that was an original Saxon institution, or whether it was borrowed from the laws of the Romans, and established by that great people when they ruled this country, may be questionable. See *ante*, p. 373.

gine, that this power of bequeathing extended originally to *all* a man's personal estate. On the contrary, Glanvil will inform us (*q*), that by the common law, *as it stood in the reign of Henry the second, a man's goods were to be divided into three equal parts: of which one went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal: or, if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so *e converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but, if he died without either wife or issue, the whole was at his own disposal (*r*). The shares of the wife and children were called their *reasonable* parts; and the writ *de rationabili parte bonorum* was given to recover them (*s*). [* 492]

This continued to be the law of the land at the time of *magna carta*, which provides, that the king's debts shall first of all be levied, and then the residue of the goods shall go to the executor to perform the will of the deceased: and, if nothing be owing to the crown, "*omnia catalla cedant defuncto; salvis uxori ipsius et pueris suis rationabilibus partibus suis*" (*t*). In the reign of king Edward the third, this right of the wife and children was still held to be the universal or common law (*u*); though frequently pleaded as the local custom of Berks, Devon, and other counties (*w*): and Sir Henry Finch lays it down expressly (*x*), in the reign of Charles the first, to be the general law of the land. But this law is at present altered by imperceptible degrees, and the deceased may now, by will, bequeath the whole of his *goods and chattels*; though we cannot trace out when first this alteration began. Indeed, Sir Edward Coke (*y*) is of

The various alterations in the law on this subject.

(*q*) L. 2, c. 5.

(*r*) Bracton, l. 2, c. 26; Flet. l. 2, c. 57.

(*s*) F. N. B. 122.

(*t*) 9 Hen. III. c. 18.

(*u*) A widow brought an action of detinue against her husband's executors, *quod cum per consuetudinem totius regni Angliæ hactenus usitatam et approbatam, uxores debent et solent atempore, &c. habere suam rationabilem partem bonorum maritorum suorum: ita videlicet, quod si nullos habuerint liberos, tunc medietatem; et, si habuerint, tunc tertiam partem, &c.*

and that her husband died worth 200,000 marks, without issue had between them; and thereupon she claimed the moiety. Some exceptions were taken to the pleadings, and the fact of the husband's dying without issue was denied; but the rule of law, as stated in the writ, seems to have been universally allowed. (M. 30 Edw. III. 25.) And a similar case occurs in H. 17 Edw. III. 9.

(*w*) Reg. Brev. 142; Co. Litt. 176.

(*x*) Law. 175.

(*y*) 2 Inst. 33.

opinion, that this never was *the general law, but only obtained in particular places by special custom: and to establish that doctrine, he relies on a passage in Bracton, which, in truth, when compared with the context, makes directly against his opinion. For Bracton(z) lays down the doctrine of the reasonable part to be the common law; but mentions that as a particular exception, which Sir Edward Coke has hastily cited for the general rule. And Glanvil, *magna carta*, Fleta, the year-books, Fitzherbert, and Finch, do all agree with Bracton, that this right to the *pars rationabilis* was by the common law: which also continues to this day to be the general law of our sister kingdom of Scotland(a). To which we may add, that, whatever may have been the custom of later years in many parts of the kingdom, or however it was introduced in derogation of the old common law, the ancient method continued in use in the province of York, the principality of Wales, and in the city of London, till very modern times: when, in order to favour the power of bequeathing, and to reduce the whole kingdom to the same standard, three statutes have been provided: the one 4 & 5 W. & M. c. 2, explained by 2 & 3 Ann. c. 5, for the province of York; another 7 & 8 Will. III. c. 38, for Wales; and a third, 11 Geo. I. c. 18, for London: whereby it is enacted, that persons within those districts, and liable to those customs, may (if they think proper) dispose of *all* their personal estates by will(11); and the claims of the widow, children, and other relations, to the contrary, are totally barred. Thus, is the old common law now utterly abolished throughout all the kingdom of England, and a man may devise the whole of his chattels as freely as he formerly could his third part or moiety. In disposing of which, he was bound by the custom of many places (as was stated in a former chapter(b)) to remember his lord and the church, by leaving them his two best chattels, which was

(z) L. 2, c. 26, s. 2.

145.

(a) Dalrymp. of Feud. Property,

(b) Pag. 426.

(11) Or rather it should seem, by a "testament," in which an executor, (or an *hæres testamentarius*, see *Androvin v. Poilblanc*, 3 Atk. 301,) is named: see *ante*, p. 490, note, and observe, that the case of *Wheeler v.*

Sheer, there cited, was a decision several years subsequent to the statute of 2 & 3 Ann. c. 5. As to the doctrine of the *pars rationabilis*, where that doctrine is still allowed ever to operate, see *post*, p. 518.

the original of heriots and mortuaries ; and afterwards he was left at his own liberty, to bequeath the remainder as he pleased.

*In case a person made no disposition of such of his goods as were testable, whether that were only part or the whole of them, he was, and is, said to die intestate ; and in such cases it is said, that by the old law the king was entitled to seize upon his goods, as the *parens patriæ*, and general trustee of the kingdom (c). This prerogative the king continued to exercise for some time by his own ministers of justice ; and probably in the county court (12), where matters of all kinds were determined : and it was granted as a franchise to many lords of manors, and others, who have to this day a prescriptive right to grant administration to their intestate tenants and suitors, in their own courts baron, and other courts, or to have their wills there proved, in case they made any disposition (d). Afterwards, the crown, in favour of the church, invested the prelates with this branch of the prerogative ; which was done, saith Perkins (e), because it was intended by the law, that spiritual men are of better conscience than laymen, and that they had more knowledge what things would conduce to the benefit of the soul of the deceased. The goods, therefore, of intestates were given to the ordinary (13) by the crown ; and he might seize them, and keep them without wasting, and also might give, aliene, or sell them at his will, and dispose of the money *in pios usus* : and, if he did otherwise, he broke the confidence which the law reposed in him (f). So that, properly, the whole interest and power which were granted to the ordinary, were only those of being the king's almoner within his diocese ; in trust to distribute the intestate's goods in charity to the poor, or in such superstitious uses as the mistaken zeal of the times had denominated pious (g). And, as he had thus the disposition of intestates' effects, the probate of wills of course followed : for it was thought just and natural, that the will of the deceased should be proved to the satisfaction of the prelate, whose right of dis-

Formerly, such goods of a person dying intestate as he had a right to dispose of by will, were vested in the ordinary to distribute in charity to the poor, and *in pios usus*.

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(c) 9 Rep. 38.

(d) Ibid. 37.

(e) S. 486.

(f) Finch, Law, 173, 174.

(g) Plowd. 277.

(12) See Vol. III. p. 95.

(13) See *post*, p. 509.

tributing his chattels for the good of his soul was effectually superseded thereby.

By stat. West. 2, the ordinary was required to pay the deceased's debts in like manner as an executor would have been liable.

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*The goods of the intestate being thus vested in the ordinary upon the most solemn and conscientious trust, the reverend prelates were, therefore, not accountable to any, but to God and themselves, for their conduct (*h*). But even in Fleta's time it was complained (*i*), "*quod ordinarii, hujusmodi bona nomine ecclesiæ occupantes nullam vel saltem indebitam faciunt distributionem.*" And to what a length of iniquity this abuse was carried, most evidently appears from a gloss of Pope Innocent IV. (*k*), written about the year 1250; wherein he lays it down for established canon law, that "*in Britannia tertia pars bonorum decedentium ab intestato in opus ecclesiæ et pauperum dispensanda est.*" Thus, the popish clergy took to themselves (*l*) (under the name of the church and poor) the whole residue of the deceased's estate, after the *partes rationabiles*, or two thirds, of the wife and children were deducted; without paying even his lawful debts, or other charges thereon. For which reason, it was enacted by the statute of Westm. 2 (*m*), that the ordinary shall be bound to pay the debts of the intestate so far as his goods will extend, in the same manner that executors were bound in case the deceased had left a will: a use more truly pious, than any *requiem*, or mass for his soul. This was the first check given to that exorbitant power, which the law had entrusted with ordinaries. But, though they were now made liable to the creditors of the intestate for their just and lawful demands; yet the *residuum*, after payment of debts, remained still in their hands, to be applied to whatever purposes the conscience of the ordinary should approve. The flagrant abuses of which power occasioned the legislature again to interpose, in order to prevent the ordinaries from keeping any longer the administration in their own hands, or those of their immediate *dependents; and therefore the statute 31 Edw. III. c. 11,

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And by 31 Edw. III. c. 11, he is

(*h*) Plowd. 277.

(*i*) L. 2, c. 57, s. 10.

(*k*) In Decretal. l. 5, t. 3, c. 42.

(*l*) The proportion given to the priest and to other pious uses, was different in different countries. In the archdeaconry of Richmond in

Yorkshire, this proportion was settled by a papal bulle, A. D. 1254, (*Regist. honoris de Richm.* 101,) and was observed till abolished by the statute 26 Hen. VIII. c. 15.

(*m*) 13 Ed. I. c. 19.

provides, that, in case of intestacy, the ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods; which administrators are put upon the same footing, with regard to suits and to accounting, as executors appointed by will. This is the original of administrators, as they at present stand; who are only the officers of the ordinary, appointed by him in pursuance of this statute, which singles out the *next and most lawful friend* of the intestate; who is interpreted (*n*) to be the *next of blood* that is under no legal disabilities. The statute 21 Hen. VIII. c. 5, enlarges a little more the power of the ecclesiastical judge; and permits him to grant administration *either* to the widow, *or* the next of kin, *or* to both of them, at his own discretion; and where two or more persons are in the same degree of kindred, gives the ordinary his election to accept whichever he pleases.

directed to appoint an administrator.

Upon this footing stands the general law of administrations at this day. I shall, in the farther progress of this chapter, mention a few more particulars, with regard to who may, and who may not, be administrator; and what he is bound to do when he has taken this charge upon him: what has been hitherto remarked only serving to show the original and gradual progress of testaments and administrations; in what manner the latter was first of all vested in the bishops by the royal indulgence; and how it was afterwards, by authority of parliament, taken from them in effect, by obliging them to commit all their power to particular persons nominated expressly by the law.

I proceed now, *secondly*, to inquire who may, or may not, make a testament; or what persons are absolutely obliged by law to die intestate (14). And this law (*o*) is entirely prohibitory; for, regularly, every person hath full power and liberty to make a will, that is not under some special prohibition by law or custom: which prohibitions are principally upon three *accounts: for want of sufficient dis-

As to who may or may not make a will.

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(*n*) 9 Rep. 39.

(*o*) Godolph. Orph. Leg. p. 1, c. 7.

(14) In pursuing this inquiry, our author appears to have taken Swinburne for his guide; the second part

of whose Treatise on Wills and Testaments he has closely followed.

cretion ; for want of sufficient liberty and free will ; and on account of their criminal conduct.

Infants.

1. In the first species are to be reckoned infants, under the age of fourteen if males, and twelve if females ; which is the rule of the civil law (*p*). For, though some of our common lawyers have held that an infant of any age (even four(15) years old) might make a testament (*q*), and others have denied that under eighteen he is capable(*r*), yet, as the ecclesiastical court is the judge of every testator's capacity, this case must be governed by the rules of the ecclesiastical law. So that no objection can be admitted to the will of an infant of fourteen, merely for want of age : but, if the testator was not of sufficient discretion, whether at the age of fourteen or four-and-twenty, that will overthrow his testament. Madmen, or otherwise *non compotes* (16), idiots or

Lunatics, &c.

(*p*) Godolph. p. 1, c. 8 ; Wentw. 212 ; 2 Vern. 104, 469 ; Gilb. Rep. 74.

(*q*) Perkins, s. 503.

(*r*) Co. Litt. 89.

(15) Mr. Christian observes, that "this has been thought an error of the press in Perkins, and that four by mistake was printed for fourteen." [The correction was first made by Swinburne, who, in a note to pt. 2, sect. 2, of his Treatise, speaks of the passage in Perkins as "*impressio vitiosa, litera (x) omissa, nam quod sic scribitur iiij. scribi debuit xiiij.*"—Ed.] "See this subject learnedly investigated by Mr. Hargrave, who concludes with the learned Judge, that a will of *personal* estate may be made by a male at the age of fourteen, and by a female at the age of twelve, and not sooner. (Harg. Co. Litt. 90.)"

(16) According to Swinburne, (pt. 2, sect. 3,) every person is presumed to be of perfect mind and memory, unless the contrary be proved. (See *White v. Wilson*, 13 Ves. 89.) And, therefore, if any person go about to impugn a testament, by reason of the testator's insanity, he must prove that impediment. It is sufficient, however, (speaking generally,) for the party who pleads the insanity of the

testator's mind, to prove that he was beside himself *before* the making of the testament ; although he do not prove the testator's madness at the very time of making such testament ; for, it being proved that the testator was once mad, the law presumeth him to continue still in that state, unless the contrary be proved. With this qualification (as laid down by Swinburne,) that if a testator were beside himself but for a short time, and in some peculiar actions, having fallen into some frenzy upon some accidental cause, which cause is afterwards taken away, or it be a long time since the testator was assaulted with such malady ;—in these cases, the testator is not presumed to continue in his former *furor*, or frenzy. And, if the depositions on the subject be contradictory, (and equally balanced,) that testimony is to be preferred which tends to favour the validity of the party's testament. Another observation, made by Swinburne, is, that if a lunatic, or one who is beside himself *at some times*, but not continually, make

natural fools (17), persons grown childish by reason of old

his testament, and it is not known whether the same were made whilst he was of sound mind and memory, or no ; then, in case the testament be so conceived that no argument of frenzy or folly can thence be gathered, it is to be presumed that the same was made during the time of his calm and clear intermissions ; and so the testament shall be adjudged good. Yea, though it cannot be proved that the testator used to have any clear and quiet intermissions at all, yet, nevertheless, if the testament be wisely and orderly framed, the same ought to be accepted for a lawful testament. But, if in the testament there be a mixture of wisdom and folly, it is to be presumed that the same was made during the testator's frenzy ; insomuch that, if there be but one word sounding to folly, it is presumed that the testator was not of sound mind when he made the same. And, therefore, in this case, the testament is void ; unless it can be proved that there was an intermission of *furor* at that time.

The whole of this doctrine, as to lucid intervals, was most explicitly adopted by Sir Wm. Wynne, in the case of *Cartwright v. Cartwright*. (1 Phillim. 100.) The distinguished judge just named said, " I think the strongest and best proof that can arise as to a lucid interval, is that which arises from the act itself ; *that* I look upon as the thing to be first examined, and if it can be established that it is a rational act, rationally done, the whole case is proved. If you show that the party did what is a rational act, and that it was *his own act entirely*, nothing is left to presumption in order to prove a lucid interval : but, unquestionably there must be complete and absolute proof that the party did the act (of which the validity is in question) without any assistance. If the party has not only formed a proper plan, as to

making a testamentary disposition, but has pursued that plan and carried it into execution with propriety and without assistance, that is sufficient ground for pronouncing it to be a legal will." So, Sir John Nicholl, (in *White v. Driver*, 1 Phillim. 88,) after declaring how strongly he was impressed with the necessity of observing great caution in examining the proof of a lucid interval, adds, " but the law recognizes acts done during such an interval as valid, and the law must not be defeated by any overstrained demands of the proof of the fact." And, in the case cited, a will was established, which was made by a testatrix proved to have been subject to insanity for several years preceding her death, and that proof brought down to the time of four days only prior to her death. But it did not appear that the disorder was uniform : and Sir John Nicholl pronounced for the validity of the will, considering the disposition itself to be neither insane nor unnatural, though the testatrix totally excluded her own sisters, giving two thirds of her property to the children of a deceased brother, and the remaining third to his widow and her second husband.

In the case of *Hall v. Warren*, (9 Ves. 610,) Sir William Grant stated it as clear law, that " all acts done during a lucid interval are to be considered as done by a person perfectly capable of contracting, managing, and disposing of his affairs at that period. This has most frequently occurred upon wills. A multitude of questions has been raised upon the execution of a will during a lucid interval ; and that being proved, the will has been held valid and effectual to all intents and purposes for the conveyance of real and personal estate, as if the testator had never been deranged. In one case, the manner in which the

age or distemper(18), such as have their senses besotted

will was written and executed went a great way towards showing it was in a lucid interval; the mode of the act being part of the evidence of the testator's sanity. However, when general lunacy is established, it is necessary to show that there was, not merely a cessation of the violent symptoms, but, a restoration of the faculties of the mind, *sufficient to enable the party soundly to judge of the act.*" The words last quoted, were delivered as an exposition of Lord Thurlow's real meaning, when (in the *Attorney General v. Parnther*, 3 Br. 444,) he said, "by a perfect (lucid) interval, I do not mean a cooler moment, a mind relieved from excessive pressure, but an interval in which the mind, having thrown off the disease, had recovered *its general habit.*" This *dictum*, if only applied in the qualified way in which Sir William Grant received it, seems open to no objection. But, Lord Eldon, taking Lord Thurlow's (reported) words more strictly, supposes him to have distinctly meant, that where lunacy is once established, a commission against the party ought not to be superseded, unless he is restored to *as perfect a state of mind as he had before.* Now, if Lord Thurlow meant to insist that it was necessary the party's mind should possess all its original tone and vigour (which any ordinary sickness may impair), Lord Eldon has irresistibly shown the injustice that would arise, if a person who once possessed the strongest mind, but who has been reduced by the delirium of fever, or any other cause, to an inferior degree of capacity, should be denied that privilege of making a will of personal estate, which is allowed to a boy at the age of fourteen. (*Ex parte Holyland*, 11 Ves. 11.) However, in *Cartwright v. Cartwright*, (1 Phillim. 119,) Sir

William Wynne said, "undoubtedly the rules laid down in the *Attorney General v. Parnther* were with a view to the particular facts of that case;" and, to be sure, the *facts* there adduced were very feeble to prove that the testatrix, who had been subject to general derangement, was restored to a disposing mind and memory: an instrument was brought to her, ready written; she was told its purport, (which she might, or might not, understand,) and asked if it met her consent; she answered "yes," and did it freely. The surprise is, not that such an instrument should have been finally set aside, but that any jury could have been found to return a verdict once in its favour. For, the same principles are applicable quite as strongly to a will of real, as to a will of personal estate; and however consonant to reason and justice any paper propounded as a will may be, in the view of an ecclesiastical court, that instrument must still appear to be, in substance and effect, the very act and deed of the deceased, and of no other person or persons whatsoever, acting in the name and on the behalf of the deceased, how well soever intentioned; otherwise the paper cannot be entitled to probate as that for which it is propounded, namely, a valid will. (*Brogden v. Brown*, 2 Addams, 441. See *ante*, the two first paragraphs of this note, but see also *infra*, the conclusion of the present paragraph.) In the case just cited, a will was opposed, on the ground, that the testatrix, at and about the whole time when the will bore date, was *delirious*; and was rendered incapable thereby of making and executing a will. The evidence indisputably proved that she was *delirious at times*, for the last three or four days of her life—a period covering the whole transaction relating to

with drunkenness (19)—all these are incapable, by reason

the will. The court distinguished between *delirium*, and fixed mental derangement, or permanent, proper *insanity*; and held the distinction to be clear in one particular, namely, in the greater comparative facility of proving a lucid interval in a case of delirium than in a case of proper insanity. For, in the latter case, the patient so affected, is not unfrequently rational to all *outward* appearance, without any *real* abatement of his malady. But, the *apparently* rational intervals of persons merely delirious, for the most part, are *really* such. Delirium is a fluctuating state of mind, created by temporary excitement; in the absence of which, to be ascertained by the appearance of the patient, he is, most commonly, really sane. Hence, as also indeed from their greater presumed frequency in most cases of delirium, the probabilities, *à priori*, in favour of a lucid interval, are infinitely stronger in a case of delirium, than in one of proper insanity; and the difficulty of proving a lucid interval is less, in the same exact proportion, in the former than in the latter case. The court also distinguished between the much greater proof of capacity which must be given to support either an "inofficious" testament, or one which is obtained by a party materially benefited thereby; and the proof which is sufficient to establish a will consonant with the testator's natural affections and moral duties; especially when such will is either the testator's own sole act, or one under which his coadjutors, if he had any, take no benefit. The court further held, that where the disposal made by a will is perfectly just and proper, it speaks for itself, and carries, upon the face of it, its own recommendation. Proof of mere acquiescence and adoption of such an

instrument, in conjunction with proof of almost any, whatever, *glimmering* of capacity at the time of the execution, it was said, would be good to support the will; and would sufficiently *indicate* mind and *volition*, to justify a court of probate in pronouncing for it as a genuine and valid will.

But, *partial* insanity may invalidate a will, which is fairly presumable to have been the *offspring* of that partial insanity. (*Dew v. Clark*, 1 Addams, 284.) If, therefore, a parent make a will, plainly *inofficious* in respect to his only child, and the parent is proved to have been, at the time of making such will, under a *morbid delusion* as to the conduct and character of that child, the court of probate will relieve, by pronouncing the will to be invalid, and holding the parent to have died intestate in law; however sane he may have been, in some other particulars, or even generally, at the time of making the will. For, as a party may be both sane and insane, at *different times*, upon the *same subject*; so, he may be both sane and insane, at the *same time*, upon *different subjects*.

"The true criterion," said Sir John Nicholl,—“the true test of the absence or presence of insanity, I take to be, the absence or presence of *delusion*. Wherever the patient once conceives something extravagant to exist, which still has no existence whatever but in his own heated imagination; and wherever he is incapable of being, permanently, reasoned out of that conception, such a patient is said to be under a *delusion*, in a peculiar, *half-technical* sense of the term; and the absence or presence of delusion, so understood, forms, in my judgment, the true and only test or criterion of absent or present insanity. In short, I look upon delusion, in

of mental disability, to make any will so long as such dis-

this sense of it, and insanity, to be almost, if not altogether, convertible terms; so that a patient under a delusion, so understood, on any subject, in any degree, is, for that reason, essentially mad, or insane, on such subject, in that degree." (*S. C. 3 Adams*, 79—209. Sir John Nicholl's decision was affirmed, on appeal, by the court of Delegates, early in 1829.)

In the case of *Maxwell v. Lord Montague*, (cited in *Baker v. Hart*, 3 Atk. 546,) a testator was determined to be *compos mentis*, upon a suit in the Ecclesiastical court, respecting probate as to his personal property, and that sentence was affirmed in the court of Delegates: afterwards, on a trial at law in relation to the real estate devised by the will, the testator was found *non compos*, and then an application was made to the House of Lords, by petition, to reverse the sentence in the court of Delegates, in order to make the determinations uniform; but the House of Lords dismissed the petition, because (according to the report) "the sentence of the Delegates is *decisive*, and no appeal lies from it." Now, that no appeal lay to the House of Lords, from a sentence of the court of Delegates, seems well established, both by positive enactment and the practical construction put thereon by other decisions as well as that of *Maxwell v. Montague*; (see stat. 25 Hen. VIII. c. 19, s. 4; *Cottington's case*, 2 Swanst. 328, n.; *Saul v. Wilson*, 2 Vern. 118;) and in opposition thereto, it is believed, nothing more can be adduced than an incidental query by Sir Bartholomew Shower, appended to his report of *Warner v. North*: (2 Show. P. C. 110:) but, although the statute of 25 Hen. VIII. enacts, that appeals from the Ecclesiastical courts shall be heard, like appeals from the court of

Admiralty, before such commissioners as shall be named by the crown, who shall have full power *definitively* to determine such appeal, and no further appeal shall be had or made from the *said* commissioners:—still, this has been construed *not* to mean, that the sentence of the commissioners *first* appointed shall be absolutely final. Lord Nottingham held, "it would be absurd, and tend to a failure of justice, to take from the king the *dernier resort*, and lodge it in the Delegates." (See 4 Ves. 195.) So, Lord Clare, Chancellor of Ireland, (in *Goodwin v. Giesler*, Irish T.R. 384,) said, "a sentence of affirmance by the court of Delegates, must bind the right of the parties finally and irrevocably, *unless* his Majesty shall be graciously pleased to interpose, and to appoint *commissioners of review*, to do that justice which ought to have been executed under the ordinary commission of appeal. That such a power rests with the crown, no man can doubt." And a list is given in a note to 4 Ves. 194, of twenty commissions of review granted between the years 1666 and 1698. It was, however, perfectly established, that a commission of review, after a sentence by the court of Delegates, was not *ex debito justitiæ*, or what the subject might claim as a right; but a prerogative of the crown, to be exercised with the advice of its officer holding the great seal, according to circumstances. (*Franklin's case*, 2 P. Wms. 299; *Cottington's case*, 2 Swanst. 328, n.; *Hill v. White*, Moseley, 34; *Matthews v. Warner*, 4 Ves. 205; *ex parte Fearon*, 5 Ves. 645; *Eagleton and Coventry v. Kingston*, 8 Ves. 465.) Since the first publication of this note, the powers of the court of Delegates have been transferred to his Majesty in Council, by the statute of 2 and 3 Gul. IV. c. 92, which also enacted, that no commis-

ability lasts (20). To this class also may be referred such persons as are *born* deaf, blind, and dumb; who, as they have always wanted the common inlets of understanding, are incapable of having *animum testandi*, and their testaments are therefore void (21).

2. Such persons as are intestable for want of liberty or Prisoners. freedom of will, are, by the civil law, of various kinds; as prisoners, captives, and the like (s) (22). But the law of England does not make such persons absolutely intestable; but only leaves it to the discretion of the court to judge, upon the consideration of their particular circumstances of duress, whether or no such persons could be supposed to have *liberum animum testandi*. And, with regard to feme- Feme-coverts.

(s) Godolph. p. 1, c. 9.

sions should be granted to review any judgment or decree made by virtue of that act.

(17) See Swinburne, pt. 2, sect. 4. An idiot, according to juridical definition, is one who, from his nativity, by a perpetual infirmity, is *non compos mentis*. (Co. Litt. 246 a.)

(18) See Swinburne, pt. 2, sect. 5. Old age alone does not justify a presumption of the party's incapacity; (*Lewis v. Pead*, 1 Ves. jun. 19;) but, when accompanied by great infirmity, it will be a circumstance of weight in estimating the validity of any transaction; (*Griffiths v. Robins*, 3 Mad. 192;) for, that hypothetical disability which is always supposed to exist during infancy, may really subsist when the party is of age, and even a much greater degree of incapacity, though the case be not one of insanity, or of lunacy, strictly speaking. (*Sherwood v. Saunderson*, 19 Ves. 283; *Ridgway v. Darwin*, 8 Ves. 67; *Ex parte Cranmer*, 12 Ves. 449.)

(19) See Swinburne, pt. 2, sect. 6. A commission of lunacy has issued against a party who, when he could be kept sober, was a very sensible man; but whose constant habits were those of intoxication. (*Anonym.* cited in

8 Ves. 66.) And in the case of *Rex v. Wright*, (2 Burr. 1099,) a rule was made upon the defendants, to show cause why a criminal information should not be exhibited against them, for the misdemeanor of using artifices to obtain a will from a woman addicted to liquor, when she was under very improper circumstances of mind to make one.

(20) "But, if a person of sound mind makes his will, this will is not revoked nor affected by his subsequent insanity. (4 Co. 61.)"—CH. [For, what the law requires is, that a testator should be of capacity at the time he *makes* his will. (Swinb. pt. 2, sect. 3.) Therefore, if a child, before he has reached the age prescribed by law, makes a written disposition of his effects, that disposition will be of no validity, though he should afterwards attain the age at which he might make a testament; unless he then expressly confirms his previous testamentary disposition; which is, in fact, making a new will. (Swinb. pt. 2, sect. 2.)—ED.]

(21) See *ante*, p. 290, note; and Swinburne, pt. 2, sect. 10 and 11.

(22) See Swinburne, pt. 2, sect. 8.

coverts, our law differs still more materially from the civil. Among the Romans there was no distinction; a married woman was as capable of bequeathing as a feme-sole (*t*).
 [* 498] But with us a *married woman is not only utterly incapable of devising *lands*, being excepted out of the statute of wills, 34 & 35 Hen. VIII. c. 5, but also she is incapable of making a testament of *chattels*, without the license of her husband (23). For all her personal chattels are absolutely his; and he may dispose of her chattels real, or shall have them to himself if he survives her: it would be therefore extremely inconsistent, to give her a power of defeating that provision of the law, by bequeathing those chattels to another (*v*). Yet by her husband's license she may make a testament (*u*); and the husband, upon marriage, frequently covenants with her friends to allow her that license: but such license is more properly his assent; for, unless it be given to the particular will in question, it will not be a complete testament, even though the husband beforehand hath given her permission to make a will (*w*). Yet it shall be sufficient to repel the husband from his general right of administering his wife's effects; and administration shall be granted to her appointee, with such testamentary paper annexed (*x*). So that, in reality, the woman makes no will at all, but only something like a will (*y*); operating in the nature of an appointment, the execution of which the husband by his bond, agreement, or covenant, is bound to allow. A distinction similar to which we meet with in the civil law. For, though a son who was *in potestate parentis* could not by any means make a formal and legal testament, even though his father permitted it (*z*), yet he might, with the like permission of his father, make what was called a *donatio mortis causa* (*a*). The queen consort is an exception to this general rule, for she may dispose of her chattels by will, without the consent of her lord (*b*): and any feme-covert may make

(*t*) Ff. 31, 1, 77.

Geo. II. B. R.

(*v*) 4 Rep. 51.

(*y*) Cro. Car. 376; 1 Mod. 211.

(*u*) Dr. & St. d. 1, c. 7.

(*z*) Ff. 28, 1, 6.

(*w*) Bro. Abr. tit. *Devise*, 34; Stra. 891.

(*a*) Ff. 39, 6, 25.

(*b*) Co. Litt. 133.

(*x*) *The King v. Bettesworth*, T. 13

(23) See Vol. I. p. 444, and *ante*, p. 375, with the notes thereto.

her will of goods, which are in her possession *in auter droit*, as executrix or administratrix; for these can never be the property of the husband (c): and, if she has any pin-money or separate maintenance, it is said she may dispose of her savings thereout *by testament, without the control of her husband (d). But, if a feme-sole makes her will, and afterwards marries, such subsequent marriage is esteemed a revocation in law, and entirely vacates the will (e) (24). [* 499]

3. Persons incapable of making testaments, on account of their criminal conduct, are, in the first place, all traitors and felons, from the time of conviction; for then their goods and chattels are no longer at their own disposal, but forfeited to the king (25). Neither can a *felo de se* make a will of goods and chattels, for they are forfeited by the act and manner of his death; but he may make a devise of his lands, for they are not subjected to any forfeiture (f) (26). Outlaws also, though it be but for debt, are incapable of making a will, so long as the outlawry subsists, for their goods and chattels are forfeited during that time (g) (27). As for persons guilty of other crimes, short of felony, who are by the civil law precluded from making testaments, (as usurers, libellers, and others of a worse stamp,) by the common law their testament may be good (h) (28). And in general the rule is, and has been so at least ever since Glanvil's time (j) *quod libera sit cujuscunque ultima voluntas*.

Let us next, *thirdly*, consider what this last will and testament is, which almost every one is thus at liberty to make; or, what are the nature and incidents of a testament. Tes-

(c) Godolph. 1, 10.

(d) Prec. Chan. 44.

(e) 4 Rep. 60; 2 P. Wms. 624.

(f) Plowd. 261.

(g) Fitz. Abr. tit. *Descent*, 16.

(h) Godolph. p. 1, c. 12.

(j) L. 7, c. 5.

(24) See *ante*, pp. 375, 433, and notes; see also Swinburne, pt. 2, sect. 9.

(25) See Swinburne, pt. 2, sections 12 and 13.

(26) Lands never were forfeited without an attainder by course of law; (3 Inst. 55;) and now, no attainder extends to the disinherison of any heir, nor to the prejudice of the right

or title of any other persons than the offenders. (Stat. 54 Geo. III. c. 145, and stat. 3 & 4 Gul. IV. c. 106, s. 10.)

(27) See Swinburne, pt. 2, sect. 21.

(28) See Swinburne. pt. 2, sections 16, 17, 19, as to the restraints which the *civil* law imposed upon the testamentary dispositions of usurers, incestuous persons, and libellers.

taments, both Justinian (*i*) and Sir Edward Coke (*k*) agree to be so called, because they are *testatio mentis*: an etymon which seems to savour too much of the conceit; it being plainly a substantive derived from the verb *testari*, in like manner as *juramentum*, *incrementum*, and others, from other verbs. The definition of the old Roman lawyers is much better than their etymology; "*voluntatis nostræ justa sententia de eo, quod quis post mortem suam fieri velit*" (*l*): which may be thus rendered into English, "the legal de-
 [* 500] "claration of a man's intentions, *which he wills to be performed after his death" (29). It is called *sententia*, to denote the circumspection and prudence with which it is supposed to be made: it is *voluntatis nostræ sententia*, because its efficacy depends on its declaring the testator's intention, whence in England it is emphatically stiled his *will*: it is *justa sententia*; that is, drawn, attested, and published, with all due solemnities and forms of law: it is *de eo, quod quis post mortem suam fieri velit*, because a testament is of no force till after the death of the testator.

Wills are of two sorts—*written*, and *verbal* or *nuncupative*.

These testaments are divided into two sorts; *written*, and *verbal* or *nuncupative*; of which the former is committed to writing, the latter depends merely upon oral evidence, being declared by the testator *in extremis* before a sufficient number of witnesses, and afterwards reduced to writing. A *codicil* (30) *codicillus*, a little book or writing, is a supplement to a will, or an addition made by the testator, and annexed to, and to be taken as part of, a testament; being for its explanation, or alteration, or to make some addition to, or else some subtraction from, the former dispositions of the testator (*m*). This may also be either written or nuncupative.

Regulations, as to nuncupative wills, by the statute of frauds.

But, as *nuncupative* wills and codicils (which were formerly more in use than at present, when the art of writing is become more universal) are liable to great impositions, and may occasion many perjuries, the statute of frauds, 29 Car. II. c. 3, hath laid them under many restrictions;

(*i*) Inst. 2, 10.

(*l*) Ff. 28, 1, 1.

(*k*) 1 Inst. 111, 322.

(*m*) Godolph. p. 1, c. 1, s. 3.

(29) See Swinburne, pt. 1, sections 3 and 4.

(30) See Swinburne, pt. 1, sect. 5. See also *ante*, p. 379, note.

except when made by mariners at sea, and soldiers in actual service. As to all other persons, it enacts: 1. That no written will shall be revoked or altered by a subsequent nuncupative one, except the same be in the lifetime of the testator reduced to writing, and read over to him, and approved (31); and unless the same be proved to have been so done by the oaths of three witnesses at the least; who, by statute 4 & 5 Ann. c. 16, must be such as are admissible upon trials at common law. 2. That no nuncupative will shall in anywise be good, where the estate bequeathed exceeds 30*l.* unless proved by three such witnesses, present at the making thereof, (the Roman law requiring seven (*n*),) and unless they or some of them were specially required to bear *witness thereto by the testator himself; and unless it was made in his last sickness, in his own habitation or dwelling-house, or where he had been previously resident ten days at the least, except he be surprised with sickness on a journey, or from home, and dies without returning to his dwelling. 3. That no nuncupative will shall be proved by the witnesses after six months from the making, unless it were put in writing within six days. Nor shall it be proved till fourteen days after the death of the testator, nor till process hath first issued to call in the widow, or next of kin, to contest it if they think proper. Thus hath the legislature provided against any frauds in setting up nuncupative wills, by so numerous a train of requisites, that the thing itself has fallen into disuse (32); and is hardly

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(*n*) Inst. 2, 10, 14.

(31) But if a legacy given by a written will has lapsed, or is void, *quatenus* the subject of such legacy, there is no written will, and a nuncupative codicil is *quasi* an original will for so much, not an alteration of that disposition which had previously become determined, or which was in its creation void. (*Stonywell's case*, T. Raym. 334). And the act which says that no written will shall be repealed or altered by a nuncupative codicil, does not prohibit the disposition, by such codicil, of that which is not disposed of by the written will.

(32) Nuncupative wills are not favourites with courts of probate, though, if duly proved, they are equally entitled to be pronounced for with written wills. Much more, however, is requisite to the due proof of a nuncupative will than of a written one, in several particulars. In the first place, the provisions of the statute of frauds must be *strictly* complied with, to entitle any nuncupative will to probate. Consequently, the absence of due proof of any one of these provisions (that enjoining the *rogatio testium*, or calling upon per-

ever heard of, but in the only instance where favour ought to be shown to it, when the testator is surprised by sudden and violent sickness. The testamentary words must be spoken with an intent to bequeath, not any loose idle discourse in his illness; for he must require the by-standers to bear witness of such his intention: the will must be made at home, or among his family or friends, unless by unavoidable accident; to prevent impositions from strangers: it must be in his *last* sickness; for, if he recovers, he may alter his dispositions, and has time to make a written will: it must not be proved at too long a distance from the testator's death, lest the words should escape the memory of the witnesses; nor yet too hastily and without notice, lest the family of the testator should be put to inconvenience, or surprised.

A will of chattels
needs no witness.

As to *written* wills, they need not any witness of their publication. I speak not here of devises of lands, which are quite of a different nature; being conveyances by statute (33), unknown to the feudal or common law, and not

sons to bear witness of the act, for instance, *Bennet v. Jackson*, 1 Phillim. 191; *Parsons v. Miller*, Ibid. 195) is fatal, at once, to a case of this species. But, added to this, and independent of the statute of frauds, the *factum* of a nuncupative will requires to be proved by evidence more strict and stringent than that of a written one, in every single particular. This is requisite in consideration of the facilities with which fraud in setting up nuncupative wills are obviously attended; facilities which absolutely require to be counteracted, by courts insisting on the strictest proof as to the *facta* of such wills. The testamentary capacity of the deceased, and the *animus testandi* at the time of the alleged nuncupation, must appear by the clearest and most indisputable testimony. Above all, it must plainly result from the evidence, that the instrument propounded contains the true substance and import, at least, of the alleged nuncupation; and consequently that it embodies the de-

ceased's *real* testamentary intentions. (*Lemann v. Bonsall*, 1 Addams, 389.)

The statute of frauds is imperative, that a nuncupative will must be proved by the oaths of three witnesses; therefore, supposing no more than three witnesses were present at the making of such will, the death of any one of them, before such proof has been formally made, will render the nuncupative will void; however clear and unsuspected the evidence of the two surviving witnesses to the transaction may be: (*Phillips v. the Parish of St. Clement's Danes*, 1 Eq. Ca. Ab. 404 :) though at law, the execution of a written will is usually proved by calling *one* of the subscribing witnesses; and the general rule of equity to examine *all* the subscribing witnesses, does not apply when any of the witnesses are dead, or cannot be discovered, or brought within the jurisdiction. (See *ante*, the additions to Mr. Christian's note to p. 378.)

(33) See *ante*, p. 378.

under the same jurisdiction as personal testaments. But a testament of chattels, written in the testator's own hand, though it has neither his name nor seal to it, nor witnesses present at its publication, is good; provided sufficient proof can be had that it is his handwriting (*o*) (34). And though

(*o*) Godolph. p. 1, c. 21; Gilb. Rep. 260.

(34) See Swinburne, pt. 1, sect. 15, and pt. 4, sect. 25. The words of the passage last cited are these: "concerning the question whether it be necessary that there be witnesses of a written will, this is the answer. If it be certain and undoubted that the testament is written and subscribed with the testator's own hand, in this case the testimony of witnesses is not necessary." Of course Swinburne meant, either that it was not necessary any witnesses should have been present at the publication of the will, as Blackstone states the doctrine; or, as Lord Eldon understood the passage in question, that *subscribing* witnesses are not necessary: for, if the handwriting of the testator be not admitted, that cannot be made certain to a court unless it is proved by witnesses. (*Eagleton and Coventry v. Kingston*, 8 Ves. 477.) But, that Swinburne's real meaning was conformable to the doctrine stated by Blackstone, rather than to the construction of Lord Eldon, and that Swinburne thought it as little necessary witnesses should be *present at the publication* of a will of personalty, as that they should *subscribe* it, seems tolerably clear, from the context of the passage cited; for, he adds, "where it is doubtful whether the testator did write or subscribe the testament, if the witnesses depose that they did see him write or subscribe it; *or else* that they did hear the testator confess that he *had made his testament*; *or*, that the same *was in the hands of such a person*; *or* if the testament were *found in the tes-*

tator's chest, amongst his other writings; in these cases, *proof made by comparing hands*, albeit, the testament be to be proved in form of law, is a full and sufficient proof; *or*, if there be *none of these helps by likely circumstances*; yet if, on the contrary, there be no suspicion of fraud, or fear of subornation, I am of their opinion who hold that the circumspect judge may allow the proof made by *comparing of hands* for a *full proof*."

In this last particular, however, as Lord Eldon observed, in the case already cited, "Swinburne's text goes further upon the comparison of handwriting than it can be stated upon our laws. According to Godolphin and Oughton also, if the custody and other circumstances make it probable, there, evidence of comparison, with those circumstances, is good: but a favourable case is required." And his lordship added, "the conduct of a man claiming under handwriting, may be evidence to be contrasted with the evidence of handwriting." In all other respects, Swinburne's doctrine appears to be in conformity with that recognized by our courts at present; but it is certain, that, in modern times, evidence given on the strength of handwriting, is received with more caution than it was formerly. (*Saph v. Atkinson and Westcott*, 1 Addams, 213; *Robson v. Rocke*, 2 Addams, 91; *Beaumont v. Perkins*, 1 Phillim. 82; *Wade v. Broughton*, 3 Ves. & Bea. 172; *Gurney v. Langlands*, 5 Barn. & Ald. 332.)

written in another man's hand, and never signed by the testator, yet, if proved to be according to his instructions and approved by him, it hath been held a good testament of the personal estate (*p*). Yet it is the safer and more prudent way, and leaves less in the breast of the ecclesiastical judge, if it be signed or sealed by the testator, and published in the presence of witnesses: which last was always required in the time of Bracton (*q*); or, rather, he in this respect has implicitly copied the rule of the civil law.

No testament is of any effect till after the death of the testator. "*Nam omne testamentum morte consummatum est: et voluntas testatoris est ambulatoria usque ad mortem* (*r*) (35)." And therefore, if there be many testaments, the last overthrows all the former (*s*): but the republication of a former will revokes one of a later date, and establishes the first again (*t*) (36).

The modes by which a will may be avoided.

Hence it follows, that testaments may be avoided three ways: 1. If made by a person labouring under any of the incapacities before mentioned: 2. By making another testament of a later date: and, 3. By cancelling or revoking it. For, though I make a last will and testament irrevocable in the strongest words, yet I am at liberty to revoke it: because my own act or words cannot alter the disposition of law, so as to make that irrevocable which is in its

(*p*) Comyns, 452, 3, 4.

(*q*) L. 2, c. 26.

(*r*) Co. Litt. 1.

(*s*) Litt. s. 168; Perk. 478.

(*t*) Perk. 479.

(35) This, Lord Loughborough observed, was the most general maxim he knew: (*Matthews v. Warner*, 4 Ves. 210): it is essential to every testamentary instrument, that it may be altered even *in articulo mortis*: (*Balch v. Symes*, 1 Turn. & Russ. 92:) irrevocability would destroy its essence as a last will. (*Hobson v. Blackburn*, 1 Addams, 278; *Reid v. Shergold*, 10 Ves. 379.)

(36) Republication of a will makes the will speak as of the time of such republication. (*Long v. Aldred*, 3

Addams, 51; *Goodtitle v. Meredith*, 2 Mau. & Sel. 14; and see *ante*, p. 379, note.) If a man by a second will revokes a former, but keeps the first undestroyed, and afterwards destroys the second; whether the first will is thereby revived, has been much questioned: the result seems to be, that no general and invariable rule prevails upon the subject, but it must depend upon the intention of the testator, as that is to be collected from the circumstances of each particular case. (See *ante*, p. 376, note.)

own nature revocable (*u*). For this, saith Lord Bacon (*w*), would be for a man to deprive himself of that, which of all other things is most incident to human condition; and that is alteration or repentance. It hath also been held, that, without an express revocation, if a man who hath made his will, afterwards marries and hath a child, this is a presumptive or implied revocation of his former will, which he made in his state of celibacy (*x*) (37). The Romans were also wont to set aside testaments as being *inofficiosa* (38), deficient in natural duty, if they disinherited or totally passed by (without assigning a true and *sufficient reason (*y*)) any of the children of the testator (*z*). But, if the child had any legacy, though ever so small, it was a proof that the testator had not lost his memory or his reason, which otherwise the law presumed; but was then supposed to have acted thus for some substantial cause: and in such case no *querela inofficiosi testamenti* was allowed. Hence probably has arisen that groundless vulgar error, of the necessity of leaving the heir a shilling, or some other express legacy, in order to disinherit him effectually: whereas the law of England makes no such constrained suppositions of forgetfulness or insanity; and therefore, though the heir or next of kin be totally omitted, it admits no *querela inofficiosi*, to set aside such a testament (39). [* 503]

We are next to consider, *fourthly*, what is an executor, and what an administrator; and how they are both to be appointed.

An executor is he to whom another man commits by will the execution of that his last will and testament. And all persons are capable of being executors, that are capable of making wills, and many others besides; as feme-coverts (40),

Of the nature and appointment of executors, and of the persons who may act as such.

(*u*) 8 Rep. 82.

204.

(*w*) Elem. c. 19.

(*y*) See book I. ch. 16, p. 448.

(*x*) Lord Raym. 441; 1 P. Wms.

(*z*) Inst. 2, 18, 1.

(37) See *ante*, p. 376, note.

(38) See Vol. I. p. 448, and *ante*, pp. 11, 13, with the notes.

(39) Courts of probate, however, look with much greater jealousy at, and require more stringent evidence in support of, an inofficious testament,

than one which is consonant with the testator's duties, and with natural feeling. (*Brogden v. Brown*, 2 Addams, 449; *Dew v. Clark*, 3 Addams, 207, both cited *ante*, p. 497, in note, which see.)

(40) But a *feme covert* should not

and infants : nay, even infants unborn, or *in ventre sa mere*, may be made executors (a). But no infant can act as such till the age of seventeen years ; till which time administration must be granted to some other, *durante minore ætate* (b) (41). In like manner as it may be granted *durante absentia*, or *pendente lite* ; when the executor is out of the realm (c), or when a suit is commenced in the ecclesiastical court touching the validity of the will (d). This appointment of an executor is essential to the making of a will (e) (42) : and it may be performed either by express words, or such as strongly imply the same (43). But if the testator makes an incomplete will, without naming any executors, or if he names incapable persons, or if the executors named refuse to act ; in any of these cases, the ordinary must *grant administration *cum testamento annexo* (f) [* 504] to some other person ; and then the duty of the administrator, as also when he is constituted only *durante minore ætate*, &c. of another, is very little different from that of an executor. And this was law so early as the reign of Henry II. ; when Glanvil (g) informs us, that “ *testamenti executores esse debent ii, quos testator ad hoc elegerit, et quibus curam ipse commiserit ; si vero testator nullos ad hoc no-*

(a) West. Symb. p. 1, s. 635.

(b) Went. Off. Ex. c. 18.

(c) 1 Lutw. 342.

(d) 2 P. Wms. 589, 590.

(e) Went. c. 1 ; Plowd. 281.

(f) 1 Roll. Abr. 907 ; Comb. 20.

(g) L. 7, c. 6.

be allowed to act as an executrix or administratrix, without the assent of her husband : for, as he would be answerable for her acts in either of those capacities, he ought not to be exposed to this responsibility, unless by his own concurrence. (See 1 Anders. 117, case 164.) It might be equally injurious to the legatees, creditors, or next of kin, of a testator, or intestate, if a married woman were allowed to act as executrix, or administratrix, when her husband was not amenable to the courts of this country ; for, if she should waste the assets, the parties interested would have no remedy, as the husband must

be joined in any action brought against her in respect of such transactions. (*Taylor v. Allen*, 2 Atk. 213.)

(41) See *post*, p. 508. By stat. 38 Geo. III. c. 87, such administration is to last till the infant attains the age of twenty-one years.

(42) Or rather, to the making of a *testament* : see *ante*, p. 490, note.

(43) Swinburne, in pt. 4, sect. 4, of his treatise, supplies many instances in which the intention of a testator to appoint certain persons his executors, may be implied, though he has not described them *eo nomine*. (And see *Pickering v. Towers*, Ambl. 364.)

“*minaverit, possunt propinqui et consanguinei ipsius defuncti ad id faciendum se ingerere.*”

But if the deceased died wholly intestate, without making either will or executors, then general letters of administration must be granted by the ordinary to such administrator as the statutes of Edward the third and Henry the eighth, before mentioned, direct. In consequence of which we may observe; 1. That the ordinary is compellable to grant administration of the goods and chattels of the wife, to the husband, or his representatives (*h*): and of the husband's effects, to the widow, or next of kin; but he may grant it to either, or both, at his discretion (*i*). 2. That, among the kindred, those are to be preferred that are the nearest in degree to the intestate; but, of persons in equal degree, the ordinary may take which he pleases (*k*). 3. That this nearness or propinquity of degree shall be reckoned according to the computation of the civilians (*l*); and not of the canonists, which the law of England adopts in the descent of real estates (*m*): because, in the civil computation, the intestate himself is the *terminus, a quo* the several degrees are numbered; and not the common ancestor, according to the rule of the canonists (44). And therefore in the first place the children, or (on failure of children) the parents of the deceased, are entitled to the administration: both which are indeed in the first degree; but* with us (*n*) the children are allowed the preference (*o*). Then follow brothers (*p*), grandfathers (*q*), un-

Of the appointment of administrators.

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(*h*) Cro. Car. 106; Stat. 29 Car. II. c. 3; 1 P. Wms. 381.

(*i*) Salk. 36; Stra. 532.

(*k*) See page 496.

(*l*) Prec. Chan. 593.

(*m*) See pages 203, 207, 224.

(*n*) Godolph. p. 2, c. 34, s. 1; 2 Vern. 125.

(*o*) In Germany there was a long dispute whether a man's children should inherit his effects during the life of their grandfather; which depends (as we shall see hereafter) on the same principles as the granting of administrations. At last it was agreed

at the diet of Arensburg, about the middle of the tenth century, that the point should be decided by combat. Accordingly, an equal number of champions being chosen on both sides, those of the children obtained the victory, and so the law was established in their favour, that the issue of a person deceased shall be entitled to his goods and chattels in preference to his parents. (Mod. Un. Hist. xxix. 28.)

(*p*) Harris in Nov. 118, c. 2.

(*q*) Prec. Chan. 527; 1 P. Wms. 41.

(44) See *ante*, page 207, note.

cles or nephews (*r*), (and the females of each class respectively,) and lastly cousins. 4. The half blood is admitted to the administration as well as the whole; for they are of the kindred of the intestate, and only excluded from inheritances of land upon feodal reasons (45). Therefore the brother of the half blood shall exclude the uncle of the whole blood (*s*); and the ordinary may grant administration to the sister of the half, or the brother of the whole blood, at his own discretion (*t*). 5. If none of the kindred will take out administration, a creditor may, by custom, do it (*u*). 6. If the executor refuses, or dies intestate, the administration may be granted to the residuary legatee, in exclusion of the next of kin (*w*). 7. And, lastly, the ordinary may, in defect of all these, commit administration (as he might have done (*x*) before the statute of Edward III.) to such discreet person as he approves of: or may grant him letters *ad colligendum bona defuncti*, which neither makes him executor nor administrator; his only business being to keep the goods in his safe custody (*y*), and to do other acts for the benefit of such as are entitled to the property of the deceased (*z*). If a bastard, who has no kindred, being *nullius filius*, or any one else that has no kindred, dies intestate, and without wife or child, it hath formerly been held (*a*) that the ordinary might seize his goods and dispose of them *in pios usus*. But the usual course now is for some one to procure letters [* 506] *patent, or other authority from the king (46); and then the ordinary of course grants administration to such appointee of the crown (*b*).

The interest in the testator's effects vested in his executor, at his decease devolves to his executors; but, in

The interest vested in the executor by the will of the deceased, may be continued and kept alive by the will of the same executor: so that the executor of A.'s executor is to all intents and purposes the executor and representative

(*r*) Atk. 455.

(*s*) 1 Ventr. 425.

(*t*) Aleyn, 36; Styl. 74.

(*u*) Salk. 38.

(*w*) 1 Sid. 281; 1 Ventr. 219.

(*x*) Plowd. 278.

(*y*) Wentw. ch. 14.

(*z*) 2 Inst. 398.

(*a*) Salk. 37.

(*b*) 3 P. Wms. 33.

(45) See *ante*, the sixth section of chap. 14, pp. 224, 234, with the notes thereto.

(46) Mr. Wooddeson (in his 15th Vin. Lect.,) observes, that, in such

cases, it is usual for the crown to reserve one tenth, or other small proportion, of the value, both of real and personal property.

of A. himself (c); but the executor of A.'s administrator, or the administrator of A.'s executor, is not the representative of A. (d). For the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence: but the administrator of A. is merely the officer of the ordinary, prescribed to him by act of parliament, in whom the deceased has reposed no trust at all: and therefore, on the death of that officer, it results back to the ordinary to appoint another. And, with regard to the administrator of A.'s executor, he has clearly no privity or relation to A.; being only commissioned to administer the effects of the intestate executor, and not of the original testator. Wherefore in both these cases, and whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary for the ordinary to commit administration afresh, *of the goods* of the deceased *not* administered by the former executor or administrator. And this administrator *de bonis non*, is the only legal representative of the deceased in matters of personal property (e). But he may, as well as an original administrator, have only a *limited* or *special* administration committed to his care, *viz.* of certain specific effects, such as a term of years, and the like; the rest being committed to others (f).

case of the de-
cease of an ad-
ministrator, a
fresh adminis-
tration must be
granted.

*Having thus shown what is, and who may be, an executor or administrator, I proceed now, *fifthly* and lastly, to inquire into some few of the principal points of their office and duty. These in general are very much the same in both executors and administrators; excepting, first, that the executor is bound to perform a will, which an administrator is not, unless where a testament is annexed to his administration, and then he differs still less from an executor: and secondly, that an executor may do many acts before he proves the will (g) (47), but an administrator may do

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Of the office and
duties of execu-
tors and admin-
istrators.

(c) Stat. 25 Edw. III. st. 5, c. 5;
1 Leon. 275.

(d) Bro. Abr. tit. *Administrator*, 7.

(e) Styl. 225.

(f) 1 Roll. Abr. 908; Godolph.
p. 2, c. 30; Salk. 36.

(g) Wentw. ch. 3.

(47) Before he proves the will, he
may lawfully perform most acts inci-

dent to the office; (*Wankford v.*
Wankford, 1 Salk. 301;) he does not

nothing (48) till letters of administration are issued; for the former derives his power from the will and not from the probate (*h*), the latter owes his entirely to the appointment of the ordinary. If a stranger takes upon him to act as executor, without any just authority (as by intermeddling with the goods of the deceased (*i*), and many other transactions (*k*)), he is called in law an executor of his own wrong, *de son tort* (49), and is liable to all the trouble of an executorship, without any of the profits or advantages: but merely doing acts of necessity or humanity, as locking up the goods, or burying the corpse of the deceased, will not amount to such an intermeddling as will charge a man as executor of his own wrong (*l*). Such a one cannot bring an action himself in right of the deceased (*m*) (50), but actions may be brought against him. And, in all actions by cre-

(*h*) Comyns, 151.

(*i*) 5 Rep. 33, 34.

(*k*) Wentw. ch. 14; Stat. 43 Eliz.

c. 8.

(*l*) Dyer, 166.

(*m*) Bro. Abr. t. *Administrator*, 8.

derive his title under the probate, but under the will; the probate is only evidence of his right: (*Smith v. Milles*, 1 T. R. 480 :) it is true, that, in order to assert completely his claims in a court of justice, he must produce the copy of the will, certified under the seal of the ordinary; but it is not necessary he should be in possession of this evidence of his right at the time he commences an action at law, as executor; it will be in due time, if he obtain it before he declares in such action: (see the last note :) so, if he file a bill in equity, in the same character, a probate obtained at any time before the hearing of the cause, will sustain the suit. (*Humphreys v. Humphreys*, 3 P. Wms. 351.)

(48) A person who takes upon himself to interfere with the effects of a party deceased, or, at all events, to dispose thereof, or apply them to his own use, will, by such interference, constitute himself an executor *de son tort*, as stated in the text; (and see *Edwards v. Harben*, 2 T. R. 597;) but Lord Hardwicke held, that, al-

though a person entitled to administration could not, before administration actually granted to him, commence an action at law, (see the last note, as to an executor who has not obtained probate,) he might be allowed to file a bill in equity, as administrator, and that such bill would be sustained by an administration subsequently taken out. (*Fell v. Lutwidge*, Barnard. Ch. Rep. 320; *S. C.* 2 Atk. 120.)

(49) Whether a man has or has not rendered himself liable to be treated as an executor *de son tort*, is not a question to be left to a jury; but is a conclusion of law, to be drawn by the court before which that question is raised. (*Padget v. Priest*, 2 T. R. 99.)

(50) But, if a person entitled to letters of administration is opposed in the ecclesiastical court, and does any acts *pendente lite* to make himself executor *de son tort*, those acts will be purged by his afterwards obtaining letters of administration. (*Curtis v. Vernon*, 3 T. R. 590.)

ditors against such an officious intruder, he shall be named an executor, generally (*n*); for the most obvious conclusion which strangers can form from his conduct, is, that he hath a will of the deceased, wherein he is named executor, but hath not yet taken probate thereof (*o*). He is chargeable with the debts of the deceased, so far as assets come to his hands (*p*): and, as against creditors in general, shall be allowed all payments made to any other creditor in the same or a superior degree (*q*), *himself only excepted (*r*). And [* 508] though, as against the rightful executor or administrator, he cannot plead such payment, yet it shall be allowed him in mitigation of damages (*s*); unless, perhaps, upon a deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt (*t*) (51). But let us now see what are the power and duty of a rightful executor or administrator.

1. He must *bury* the deceased in a manner suitable to the estate which he leaves behind him. Necessary funeral expenses are allowed, previous to all other debts and charges; but if the executor or administrator be extravagant, it is a species of *devastation* or waste of the substance of the deceased, and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased (*u*). 1. The burial of the deceased, in a suitable manner.

2. The executor, or the administrator *durante minore ætate*, or *durante absentia*, or *cum testamento annexo*, must *prove the will* of the deceased: which is done either in *common form*, which is only upon his own oath before the ordinary, or his surrogate; or *per testes*, in more solemn form of law, in case the validity of the will be disputed (*w*). 2. The proof of the will, or the taking out of letters of administration.

(*n*) 5 Rep. 31.

(*s*) 12 Mod. 441, 471.

(*o*) 12 Mod. 471.

(*t*) Wentw. ch. 14.

(*p*) Dyer, 166.

(*u*) Salk. 196; Godolph. p. 2, c.

(*q*) 1 Chan. Cas. 33.

26, s. 2.

(*r*) 5 Rep. 30; Moor, 527.

(*w*) Godolph. p. 1, c. 20, s. 4.

(51) Mr. Christian observes, that "it is held, that the least intermeddling with the effects of the intestate, even milking cows, or taking a dog, will constitute an executor *de son tort*. (Dy. 166.) An executor of his own wrong will be liable to an action, unless he has delivered over the goods

of the intestate to the rightful administrator before the action is brought against him. And he cannot retain the intestate's property in discharge of his own debt, although it is a debt of a superior degree. (3 T. R. 590; 2 T. R. 100.)"—[See *post*, p. 511.—Ed.]

When the will is so proved, the original must be deposited in the registry of the ordinary; and a copy thereof in parchment is made out under the seal of the ordinary, and delivered to the executor or administrator, together with a certificate of its having been proved before him: all which together is usually styled the *probate*. In defect of any will, the person entitled to be administrator must also, at this period, take out letters of administration under the seal of the ordinary; whereby an executorial power to collect and administer, that is, dispose of the goods of the deceased, is vested in him: and he must, by statute 22 & 23 Car. II. c. 10, enter into a bond with sureties, faithfully to execute his trust. If all the goods of the deceased lie within the same jurisdiction, a probate before the *ordinary, or an administration granted by him, are the only proper ones: but if the deceased had *bona notabilia*, or chattels to the value of a hundred shillings, in two distinct dioceses or jurisdictions, then the will must be proved, or administration taken out, before the metropolitan of the province, by way of special prerogative (*x*); whence the courts where the validity of such wills is tried, and the offices where they are registered, are called the prerogative courts, and the prerogative offices, of the provinces of Canterbury and York. Lyndewode, who flourished in the beginning of the fifteenth century, and was official to Archbishop Chichele, interprets these hundred shillings to signify *solidos legales*; of which he tells us, seventy-two amounted to a pound of gold, which in his time was valued at fifty nobles, or 16*l.* 13*s.* 4*d.* He, therefore, computes (*y*) that the hundred shillings, which constituted *bona notabilia*, were then equal in current money to 23*l.* 3*s.* 0½*d.* This will account for what is said in our ancient books, that *bona notabilia* in the diocese of London (*z*) and indeed every where else (*a*), were of the value of ten pounds by *composition*: for, if we pursue the calculations of Lyndewode to their full extent, and consider that a pound of gold is now almost equal in value to an hundred and fifty nobles, we shall extend the present amount of *bona notabilia* to nearly 70*l.* But the makers of the canons of 1603, un-

(*x*) 4 Inst. 335.

(*z*) 4 Inst. 335; Godolph. p. 2,

(*y*) *Provinc.* l. 3, t. 13, c. *item.* v. c. 22.
centum. et c. statutum v. laicis.

(*a*) Plowd. 281.

derstood this ancient rule to be meant of the shillings current in the reign of James I., and have, therefore, directed (*b*) that *five pounds* shall, for the future, be the standard of *bona notabilia*, so as to make the probate fall within the archiepiscopal prerogative. Which prerogative (properly understood) is grounded upon this reasonable foundation: that, as the bishops were themselves originally (52) the administrators to all intestates in their own diocese, and as the present administrators are, in effect, no other than their officers or substitutes, it was impossible for the bishops, or those who acted under them, to collect any goods of the deceased, other than such as lay within their *own dioceses, beyond which their episcopal authority extends not. But it would be extremely troublesome, if as many administrations were to be granted, as there are dioceses within which the deceased had *bona notabilia*; besides the uncertainty which creditors and legatees would be at, in case different administrators were appointed, to ascertain the fund out of which their demands are to be paid. A prerogative is, therefore, very prudently vested in the metropolitan of each province, to make in such cases one administration serve for all. This accounts very satisfactorily for the reason of taking out administration to intestates that have large and diffusive property, in the prerogative court: and the probate of wills naturally follows, as was before observed, the power of granting administrations; in order to satisfy the ordinary that the deceased has, in a legal manner, by appointing his own executor, excluded him and his officers from the privilege of administering the effects. [* 510]

3. The executor or administrator is to make an *inventory* (*c*) of all the goods and chattels, whether in possession or action, of the deceased; which he is to deliver in to the ordinary upon oath, if thereunto lawfully required (53).

3. The making an inventory of the deceased's effects.

(*b*) Can. 92.

(*c*) Stat. 21 Hen. VIII. c. 5.

(52) See p. 494.

(53) The ecclesiastical courts do not compel all executors to give an inventory; and always inquire into the interest of a party who requires one; but, even a probable or contingent interest will justify a party in calling for an inventory; and, in such

cases, that which is by law required generally, must be enforced. There is only one case in which it could be refused; that is, if a creditor had brought a suit in chancery for a discovery of assets; there, the ecclesiastical court might say, the party should not proceed in both courts. (*Phillips*

4. The collecting and converting them into money.

4. He is to *collect* all the goods and chattels so inventoried ; and to that end he has very large powers and interests conferred on him by law ; being the representative of the deceased (*d*), and having the same property in his goods as the principal had when living, and the same remedies to recover them. And if there be two or more executors, a sale or release by one of them shall be good against all the rest (*e*) ; but in case of administrators it is otherwise (*f*). Whatever is so recovered, that is of a saleable nature and may be converted into ready money, is called *assets* in the hands of the executor or administrator (*g*) ; that is, sufficient or enough (from the French *assez*) to make him chargeable to a creditor or legatee, so far as such goods and chattels extend. * Whatever assets so come to his hands he may convert into ready money, to answer the demands that may be made upon him : which is the next thing to be considered : for,

5. The payment of the debts of the deceased.

5. The executor or administrator must *pay* the *debts* of the deceased. In payment of debts he must observe the rules of priority ; otherwise, on deficiency of assets, if he pays those of a lower degree first, he must answer those of a higher out of his own estate. And, first, he may pay all funeral charges, and the expense of proving the will, and the like. Secondly, debts due to the king on record or specialty (*h*). Thirdly, such debts as are by particular statutes to be preferred to all others ; as the forfeitures for not burying in woollen (*i*), money due upon poors rates (*k*), for letters to the post office (*l*), and some others. Fourthly, debts of record ; as judgments, (docquetted according to the statute 4 & 5 W. & M. c. 20,) statutes and recognizances (*m*) (54). Fifthly,

The order in which those debts are to be paid.

(*d*) Co. Litt. 209.

(*e*) Dyer, 23.

(*f*) 1 Atk. 460.

(*g*) See page 244.

(*h*) 1 And. 129.

(*i*) Stat. 30 Car. II. c. 3.

(*k*) Stat. 17 Geo. II. c. 38.

(*l*) Stat. 9 Ann. c. 10.

(*m*) 4 Rep. 60 ; Cro. Car. 363.

v. *Bignell*, 1 Phillim. 240 ; *Myddleton v. Rushout*, Ibid. 247.)

(54) A final decree for payment of a debt, or other personal demand, is equal to a judgment. (*Gray v. Chiswell*, 9 Ves. 125 ; *Goate v. Fryer*, 2

Cox, 202.) Courts of equity will not restrain proceedings at law by creditors, who are seeking in that way to obtain payment by executors, until there is a decree for carrying the trusts of the will into execution, under

debts due on special contracts ; as for rent (for which the lessor has often a better remedy in his own hands, by distressing), or upon bonds, covenants, and the like, under seal (*n*) (55). Lastly, debts on simple contracts, *viz.* upon notes unsealed, and verbal promises. Among these simple contracts, servants' wages are by some (*o*) with reason preferred to any other : and so stood the ancient law, according to Bracton (*p*) and Fleta (*q*), who reckon among the first debts to be paid, *servitia servientium et stipendia famulorum*. Among debts of equal degree, the executor or administrator is allowed to pay himself first, by retaining in his hands so much as his debt amounts to (*r*). But an executor of his own wrong is not allowed to retain (56) : for that would tend to encourage creditors to strive who should first take possession of the goods of the deceased ; and would besides be taking advantage of his own wrong, which is contrary to the rule of law (*s*). If a *creditor constitutes his debtor his executor, this is a release or discharge of the debt, whether the executor acts or no (*t*) ; provided there be assets sufficient to pay the testator's debts : for though this discharge of the debt shall take place of all legacies (57), yet it were

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(*n*) Wentw. ch. 12.(*o*) 1 Roll. Abr. 927.(*p*) L. 2, c. 26.(*q*) L. 2, c. 56, s. 10.(*r*) 10 Mod. 496. See Vol. III. p. 18.(*s*) 5 Rep. 30.(*t*) Plowd. 184 ; Salk. 299.

a bill filed by other creditors. (*Rush v. Higgs*, 4 Ves. 643 ; *Martin v. Martin*, 1 Ves. sen. 213.) But, from the moment a final decree to that effect is made, it is considered as a judgment in favour of *all* the creditors ; and there the court of equity could not execute its own decree, if it permitted the course of payment to be altered by a subsequent judgment of a court of law. (*Largan v. Bowen*, 1 Sch. & Lef. 299 ; *Paxton v. Douglas*, 8 Ves. 521.) Between decrees and judgments, the right to priority of payment is determined by their *real* priority of date. (See *ante*, p. 342, note ; and further, as to the classification and priority of debts, see *ante*, p. 465.)

(55) Mr. Christian observes, that " a court of equity will order voluntary bonds or other special contracts, without consideration, to be postponed to simple contract debts. (3 P. Wms. 222.)" [See *ante*, p. 340, notes, as to bonds *pro turpi causa* ; and as to the importance of a good and sufficient consideration, to support a bond, or other deed, see *ante*, pp. 296, 297, with the notes thereto.—ED.]

(56) See *ante*, pp. 507 and 508, and Vol. III. p. 19.

(57) Such is, certainly, the rule at common law ; and it has been questioned, formerly, whether it did not hold in equity : (*Brown v. Selwin*, Ca. temp. Talb. 242 :) but, it seems to have been long esteemed the better

unfair to defraud the testator's creditors of their just debts by a release which is absolutely voluntary (*u*). Also, if no suit is commenced against him, the executor may pay any one creditor in equal degree his whole debt, though he has nothing left for the rest : for, without a suit commenced (58), the executor has no legal notice of the debt (*w*).

(*u*) Salk. 303; 1 Roll. Abr. 921.

(*w*) Dyer, 32; 2 Leon. 60.

opinion, that a debt due from a testator's executor is general assets for payment of the testator's legacies : (*Phillips v. Phillips*, 2 Freem. 11; *Anonym. c.* 58; *ibid.* 52 :) and that, in such cases, though the action at law is gone, the duty remains ; which may be sued for either in equity or in the spiritual court. (*Flud v. Rumsey*, Yelv. 150; *Hudson v. Hudson*, 1 Atk. 461.) Lord Thurlow, (in *Casey v. Goodinge*, 3 Br. 111,) and Sir William Grant, (in *Berry v. Usher*, 11 Ves. 90,) treated this as a point perfectly settled : and Lord Erskine (in *Simmons v. Gutteridge*, 13 Ves. 264,) said, a debt due by an executor to the estate of his testator is assets, but, he cannot sue himself ; and the consequence seems necessary, that, in all cases, under the usual decree against an executor, an interrogatory ought to be pointed to the inquiry, whether he has assets in his hands arising from a debt due by himself : and any legatee has a right to exhibit such an interrogatory, if it has been omitted in drawing up the decree to account.

Some writers have, indeed, thought that the appointment of a debtor to be the executor of his creditor, ought to be considered in the light of a specific bequest or legacy to the debtor ; (see Hargrave's note (1) to Co. Litt. 264 b;) yet, even if this really were so, it would be difficult to maintain the executor's right of retainer as against other legatees ; (see *post*, p. 512;) but Lord Holt (in *Wankford v. Wankford*, 1 Salk. 306) said, "When the obligee makes the obligor his ex-

ecutor, though it is a discharge of the action, yet the debt is assets ; and the making him executor does *not* amount to a legacy, but to payment and a release. If H. be bound to J. S. in a bond of 100*l.*, and then J. S. makes H. his executor ; H. *has* actually *received so much money, and is answerable for it*, and if he does not administer so much, it is a *devastavit*."

(58) It is not enough that a suit has been commenced, (*Sorrell v. Carpenter*, 2 P. Wms. 483,) there must have been a decree for payment of debts, or an executor will be at liberty to give a preference, amongst creditors of equal degree. (*Maltby v. Russell*, 2 Sim. & Stu. 228; *Perry v. Philips*, 10 Ves. 39; and see the note to the last page.) But if an executor who has, in any way, notice of an outstanding bond, or other specialty affecting his testator's assets, confesses a judgment in an action brought for a simple contract debt, should judgment be afterwards given against him on the bond, he will be obliged, however insufficient the assets, to satisfy both the judgments ; for, to the debt on simple contract, he might have pleaded the demand of a higher nature. An executor must not, by negligence or collusion, defeat specialty creditors of his testator, by confessing judgments on simple contract debts, of which he had notice. (*Sawyer v. Merrer*, 1 T. R. 690; *Davies v. Monkhouse*, Fitz-Gib. 77; *Britton v. Bathurst*, 3 Lev. 115.) And where the testator's debt was a debt upon record, or established by a

6. When the debts are all discharged, the *legacies* claim the next regard ; which are to be paid by the executor so

6. The payment of legacies.

judgment or decree, the executor will be held to have had sufficient constructive notice thereof, and it will be immaterial whether he had actual notice or not. If he has paid any debts of inferior degree, he will be answerable as for a *devastavit*. (*Littleton v. Hibbins*, Cro. Eliz. 793 ; *Searle v. Lane*, 2 Freem. 104 ; *S. C.* 2 Vern. 37.)

Since the statute of 3 Will. & Mary, c. 14, (which, it is true, has been repealed by the statute of 11 Geo. IV. and 1 Gul. IV. c. 47, but only for the purpose of consolidating the whole provisions of the law, on this head, into one act;) simple contract debts are let in to be paid *pari passu* with debts by specialty, when a testator has limited lands to his executors or trustees, in trust for payment of his debts generally. (*Kidney v. Coussmaker*, 12 Ves. 154.) But this rule seems to have been of earlier date than the statute. (*Foly's case*, 2 Freem. 49 ; *Hickson v. Witham*, *ibid.* c. 12, in Appendix to 2nd edit. 306.) And it is now settled, that a *charge* for payment of debts, which does not break the descent of real estate to the heir, will be *equitable* assets for the payment of all creditors alike. (*Shiphard v. Lutwidge*, 8 Ves. 30 ; *Bailey v. Ekins*, 7 Ves. 323 ; *Clay v. Willis*, 1 Barn. & Cress. 372 ; 2 D. & R. 546.)

If, therefore, specialty creditors sweep away the whole of the testator's personal assets, they will not be allowed to participate in the benefit of the devise, until the creditors by simple contract have received so much thereof as to make them equal and upon the level with the creditors by specialty, in respect of what *they* received out of the personal estate. (*Haslewood v. Pope*, 3 P. Wms. 323.) And whenever a plaintiff is under the necessity of applying to the court of

Chancery for relief, the general rule of that court is, to do equal justice to all creditors, without any distinction. (*Plunkett v. Penson*, 2 Atk. 293.) Thus, the equity of redemption of a mortgage of a term for years, has been held equitable assets ; (*Sir Charles Cox's case*, 3 P. Wms. 341 ; *Hartwell v. Chitters*, Ambl. 308 ; *Newton v. Bennet*, 1 Br. 137 ; *Clay v. Willis*, 1 Barn. & Cress. 372 ; 2 D. & R. 546 ;) and so, perhaps, would an equity of redemption of a mortgage in fee, if mere bond creditors contended for priority of payment ; (for it is clear such assets could only be got at by aid of equity ;) but it has been decided, that in such a case, judgment creditors could not be compelled to come in *pari passu* with simple contract creditors, but that, as the judgment creditors had a right to redeem, they must be paid in the first instance, and there could be no marshalling as against them. (*Sharpe v. Earl of Scarborough*, 3 Ves. 542.)

Since this note was first published, the statute of 3 & 4 Gul. IV. c. 104, has been passed, by which it is enacted, that when any person shall die seised of or entitled to freehold or copyhold estates, which he has *not*, by his will, charged with or devised subject to payment of his debts, the same shall be assets to be administered in courts of equity for the payment of all the just debts of such person ; but creditors by specialty, *in which the heirs are bound*, are to be entitled to priority of payment.

The personal estate of a testator is the primary fund for payment of his debts and legacies ; and it will not be enough for the personal representative to show that the real estate is charged therewith ; he must satisfactorily show that the personal estate is discharged : (*Tower v. Lord Rous*, 18 Ves. 138 ;

far as his assets will extend ; but he may not give himself the preference herein, as in the case of debts (x).

In case of deficiency of assets, general legacies must be proportionably abated.

A legacy is a bequest, or gift, of goods and chattels by testament ; and the person to whom it was given is styled the legatee : which every person is capable of being, unless par-

(x) 2 Vern. 434 ; 2 P. Wms. 25. [2 Freem. 134 ; 2 Atk. 171.—ED.]

Bootle v. Blundell, 19 Ves. 548 ; *Watson v. Brickwood*, 9 Ves. 454 ; *Barnewall v. Lord Cawdor*, 3 Mad. 456 :) still, where such an intention is plainly made out, it will prevail : (*Greene v. Greene*, 4 Mad. 157 ; *Burton v. Knowlton*, 3 Ves. 108 :) and parties entitled, by descent or devise, to real estate, cannot claim to have the incumbrance thereon discharged out of their ancestor's or devisor's personal estate, so as to interfere with specific, or even with general legatees : (*Bishop v. Sharpe*, 2 Freem. 278 ; *Tipping v. Tipping*, 1 P. Wms. 730 ; *O'Neale v. Meade*, Ibid. 694 ; *Davis v. Gardiner*, 2 P. Wms. 190 ; *Rider v. Wager*, Ibid. 335 :) and, *a fortiori*, they could not maintain such a claim, when it would go to disappoint creditors. (*Lutkins v. Leigh*, Ca. temp. Talb. 54 ; *Goree v. Marsh*, 2 Freem. 113.)

When the owner of an estate has, himself, subjected it to a mortgage debt, and dies ; his personal estate is first applicable to the discharge of his covenant for payment of that debt : (*Robinson v. Gee*, 1 Ves. sen. 252 :) and the case would be the same even although the mortgagor had entered into no such personal covenant, provided he received the money. (*King v. King*, 3 P. Wms. 360 ; *Cope v. Cope*, 2 Salk. 449.) The mere form of devising a mortgaged estate, *subject to the incumbrance thereon*, (but without expressly exonerating the other funds from liability in respect thereof,) will not affect the question as to the application of assets in discharge of the debt ; those words con-

vey no more than would be implied if they had not been used. (*Serle v. St. Eloy*, 2 P. Wms. 386 ; *Bootle v. Blundell*, 19 Ves. 523.) This rule, however, does not apply where the mortgage debt was not contracted by the testator, and whose personal estate, consequently, was never augmented by the borrowed money ; for such a construction would be to make the personal estate of one man answerable for the debt of another. (*Evelyn v. Evelyn*, 2 P. Wms. 664 ; *Earl of Tankerville v. Fawcett*, 1 Cox, 239 ; *Basset v. Percival*, 1 Cox, 270 ; *Parsons v. Freeman*, Ambl. 115 ; *Tweddel v. Tweddel*, 2 Br. 154.) But any one may, of course, so act as to make his personal assets liable to the discharge of debts contracted by another. (*Woods v. Huntingford*, 3 Ves. 152.)

Though a court of equity cannot prevent a creditor from coming upon the personal estate of his deceased debtor, in respect of a debt which might be demanded out of his real estate ; still the other creditors will have an equity to charge the real estate for so much as, by that means, is taken out of the personal estate. (*Colchester v. Lord Stamford*, 2 Freem. 124 ; *Grise v. Goodwin*, Ibid. 265.) And if a bill has been filed for administration of the assets, should it appear that a specialty creditor has been paid out of the personal estate, it is not necessary to file another bill for the purpose of marshalling the assets ; but the court will, without being called on, give the requisite directions. (*Gibbs v. Augier*, 12 Ves. 416.)

ticularly disabled by the common law or statutes, as traitors, papists(59), and some others. This bequest transfers an inchoate property to the legatee; but the legacy is not perfect without the assent of the executor: for, if I have a *general* or *pecuniary* legacy of 100*l.*, or a *specific* one of a piece of plate, I cannot in either case take it without the consent of the executor(*y*). For in him all the chattels are vested (60); and it is his business first of all to see whether there is a sufficient fund left to pay the debts of the testator: the rule of equity being, that a man must be just, before he is permitted to be generous; or, as Bracton expresses the sense of our ancient law (*z*), “*de bonis defuncti primo deducenda sunt ea quæ sunt necessitatis, et postea quæ sunt utilitatis, et ultimo quæ sunt voluntatis.*” And in case of a deficiency of assets, all the *general* legacies must abate proportionably, in order to pay the debts; *but a *specific* legacy (of a piece of plate, a horse, or the like) is not to abate at all, or allow

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(*y*) Co. Litt. 111; Aleyn. 39.(*z*) L. 2, c. 26.

(59) This ground of disability no longer disgraces the statute book.

(60) It has been much questioned, whether it was not the intention of the legislature, that a specific devise of stock in the public funds should be considered in the nature of a parliamentary appointment, and not want the assent of the executor; (*Pearson v. The Bank of England*, 2 Cox, 179;) though a different practical construction has been put on the statute creating government annuities; (*Bank of England v. Lunn*, 15 Ves. 578;) and it must now be taken to be the law, that stock, like all other personal property, is assets in the hands of the executor. The consequence necessarily follows, that it must vest in the executor, and, till he assents, the legatee has no right to the legacy. (*Franklin v. The Bank of England*, 1 Russ. 597; *Bank of England v. Moffat*, 3 Br. 262.)

The assent of the executor is equally necessary whether a legacy be specific or merely pecuniary; (*Flanders v. Clarke*, 3 Atk. 510; *Abney v. Miller*, 2

Atk. 598;) a court of equity, indeed, will compel the executor to deliver the specific articles devised; (*Northey v. Northey*, 2 Atk. 77;) but, as a general rule, no action at law can be maintained for a legacy, (*Deeks v. Strutt*, 5 T. R. 692,) or for a distributive share under an intestacy. (*Jones v. Tanner*, 7 Barn. & Cress. 544; 1 Man. & Ry. 424.) It was held, however, in *Doe v. Guy*, (3 East, 123,) to be clear, from all the authorities, that the interest in any specific thing bequeathed vests, at law, in the legatee, upon the assent of the executor; and, therefore, that, whenever an executor has given assent (expressly, and not merely by implication,) to a specific legacy, should he subsequently withhold it, the legatee may maintain an action at law for the recovery of the interest so vested in him. If a deficiency of assets to pay creditors were afterwards to appear, the court of Chancery would have power to interfere, and make the legatee refund, in the proportion required.

any thing by way of abatement, unless there be not sufficient without it (a) (61). Upon the same principle, if the legatees

(a) 2 Vern. 111.

(61) A specific legacy is an immediate gift of any fund bequeathed, with all its produce; and is therefore an exception to the general rule, that a legacy does not carry interest till the end of a year after the testator's death: (*Raven v. Waite*, 1 Swanst. 557; *Barrington v. Tristram*, 6 Ves. 349;) and, though the payment of a principal fund, bequeathed to an infant, may depend on his attaining his majority; yet, the interest accrued from the death of the testator, may belong to the legatee, notwithstanding he does not live to take any thing in the principal. (*Deane v. Test*, 9 Ves. 153.)

The criterion of a specific legacy is, that it is liable to ademption; that when the thing bequeathed is once gone, in the testator's lifetime, it is absolutely lost to the legatee. (*Parrot v. Worsfield*, 1 Jac. & Walk. 601.) When, therefore, a testator has bequeathed a legacy of certain stock in the public funds, or of a particular debt, so described as to render the bequest, in either case, specific; if that stock should be afterwards sold out by the testator, or if that debt should, in his lifetime, be paid or cancelled, the legacy would be adeemed. (*Ashburner v. M'Guire*, 2 Br. 109.) And it appears that there is no distinction between a voluntary and a compulsory payment to the testator, as to the question of ademption. (*Innes v. Johnson*, 4 Ves. 574.) The idea of proceeding on the *animus adimendi*, (though supported by plausible reasoning,) was found to introduce a degree of confusion into the decisions on the subject, and to afford no precise rule. (*Stanley v. Potter*, 2 Cox, 182; *Humphreys v. Humphreys*, 2 Cox, 185.) It seems, therefore, now esta-

blished that, whenever the testator has himself received, or otherwise disposed of, the subject of gift, the principle of ademption is, that the thing given no longer exists; and if, after a particular debt given by will had been received by the testator, it could be demanded by the legatee, that would be converting it into a pecuniary, instead of a specific legacy. (*Fryer v. Morris*, 9 Ves. 363; *Barker v. Rayner*, 5 Mad. 217.) Where, indeed, the identical *corpus* is not given; (*Selwood v. Mildmay*, 3 Ves. 310;) where the legacy is not specific, but what is termed in the civil law a demonstrative legacy—that is, a general pecuniary legacy, with a particular security pointed out as a convenient mode of payment; there, although such security may be called in, or fail, the legacy will not be adeemed: (*Guillaume v. Adderley*, 15 Ves. 389; *Sibley v. Perry*, 7 Ves. 529; *Kirby v. Potter*, 4 Ves. 751; *Le Grice v. Finch*, 3 Meriv. 52; *Fowler v. Willoughby*, 2 Sim. & Stu. 358;) but, when it is once settled that a legacy is specific, the only safe and clear way, it has been judicially said, is to adhere to the plain rule—that there is an end of a specific gift, if the specific thing do not exist at the testator's death. (*Barker v. Rayner*, 5 Mad. 217; *S. C.* on appeal, 2 Russ. 125.)

Courts of equity are always anxious to hold a legacy to be pecuniary, rather than specific, where the intention of the testator is at all doubtful. (*Chaworth v. Beech*, 4 Ves. 566; *Innes v. Johnson*, *ibid.* 573; *Kirby v. Potter*, *ibid.* 752; *Sibley v. Perry*, 7 Ves. 529; *Webster v. Hale*, 8 Ves. 413.)

The greater part of this note is extracted from 1 Hovenden's Suppl. to Ves. jun. Reports, 312.

had been paid their legacies, they are afterwards bound to refund a rateable part, in case debts come in, more than sufficient to exhaust the *residuum* after the legacies paid (b). And this law is as old as Bracton and Fleta; who tell us (c), “*si plura sint debita, vel plus legatum fuerit, ad quæ catalla defuncti non sufficient, fiat ubique defalcatio, excepto regis privilegio.*”

If the legatee dies before the testator, the legacy is a lost or *lapsed* legacy, and shall sink into the *residuum*. And if a *contingent* legacy be left to any one, as *when* he attains, or *if* he attains, the age of twenty-one, and he dies before that time, it is a lapsed legacy (d) (62). But a legacy to one, *to be paid* when he attains the age of twenty-one years, is a *vested* legacy; an interest which commences *in præsentī*, although it be *solvendum in futuro*: and if the legatee dies

If the legatee die before the testator, the legacy is lapsed, and goes to form part of the residuary estate.

(b) 2 Vern. 205. (c) Bract. l. 2, c. 26; Flet. l. 2, c. 57, s. 11.

(d) Dyer, 59; 1 Eq. Cas. Abr. 295.

(62) A legacy may be so given, as that the legatee shall be entitled to the interest or produce thereof, from the time of the testator's death to his own, although such legatee may not live long enough to entitle himself to the principal. (*Deane v. Test*, 9 Ves. 153, as cited in the last note.)

But where a bequest is made to a legatee, “at his age of twenty-one,” or any other specified age; or, “if he attain such age;” this is such a description of the person who is to take, that if the legatee do not sustain the character at that time, the legacy will fail: the time when it is to be paid is attached to the legacy itself, and the condition precedent prevents the legacy from vesting. (*Parsons v. Parsons*, 5 Ves. 582; *Sansbury v. Read*, 12 Ves. 78; *Errington v. Chapman*, Ibid. 24.) But if the legacy be to an infant, “payable at twenty-one,” the legacy is held to be vested; the description of the legatee is satisfied, and the other part of the direction refers to the payment only. This distinction (as stated in the text) is borrowed from the civil law, but is adop-

ted as to personal legacies only, not as to bequests charged upon real estate; and it has been spoken of, in many cases, as a rule neither to be extended nor approved. (*Dawson v. Killett*, 1 Br. 123; *Duke of Chandos v. Talbot*, 2 P. Wms. 613; *Mackell v. Winter*, 3 Ves. 543; *Bolger v. Mackell*; 5 Ves. 509; *Hanson v. Graham*, 6 Ves. 245.) If real estate, either copyhold or freehold, be devised to an infant and his heirs, “when and so soon as” he should attain a certain age; these words, it has been decided, only denote the time when the beneficial interest is to take effect in possession; but the interest vests immediately upon the testator's decease; and should the devisee die before he attains the specified age, the estate will descend to his heir-at-law. It would be a different thing if the devise were to the infant “if he attained a certain age,” those words would create a condition precedent, and no interest would vest in him unless he attained that age. (*Doe v. Lea*, 3 T. R. 42; *Boraston's case*, 3 Rep. 21.)

before that age, his representatives shall receive it out of the testator's personal estate, at the same time that it would have become payable, in case the legatee had lived (63). This distinction is borrowed from the civil law (*e*); and its adoption in our courts is not so much owing to its intrinsic equity, as to its having been before adopted by the ecclesiastical courts. For, since the chancery has a concurrent jurisdiction with them, in regard to the recovery of legacies, it was reasonable that there should be a conformity in their determinations; and that the subject should have the same measure of justice in whatever court he sued (*f*). But, if such legacies be charged upon a real estate, in both cases they shall lapse for the benefit of the heir (*g*); for, with regard to devises affecting lands, the ecclesiastical court hath no concurrent jurisdiction (64). And, in case of a

(*e*) Ff. 35, 1, 1 & 2.

(*f*) 1 Equ. Cas. Abr. 295.

(*g*) 2 P. Wms. 601.

(63) But it seems, if the testator's personal representatives were to be accountable for interest, and the delay of payment, as to the principal, was only directed with reference to the minority of the legatee, his executor or administrator may claim the legacy forthwith, provided a year has elapsed since the death of the original testator. (*Crickett v. Dolby*, 3 Ves. 13; *Cloberry v. Lampen*, 2 Freem. 25; *Anonym.* Ibid. 64; *Anonym.* 2 Vern. 199; *Green v. Pigot*, 1 Br. 105; *Fonnereau v. Fonnereau*, 1 Ves. sen. 119.) But a small yearly sum directed to be paid for the maintenance of the infant legatee, will not be deemed equivalent, for the purpose of vesting a legacy, to a direction that interest should be paid on the legacy. (*Chester v. Painter*, 2 P. Wms. 336; *Hanson v. Graham*, 6 Ves. 249; *Roden v. Smith*, Ambl. 588.) If a bequest, however, be made to an infant, "at his age of twenty-one years, and if he die before that age, then over to another;" in such case, the legatee over does not claim under the infant, but

the bequest over to him is a distinct substantive bequest, and is to be paid on the death of the infant under twenty-one. (*Laundy v. Williams*, 2 P. Wms. 480; *Crickett v. Dolby*, 3 Ves. 16.)

(64) Where legacies are charged upon land, or the gift at all savours of the *realty*, the trusts must be carried into execution with analogy to the common law. (*Scott v. Tyler*, 2 Dick. 719; *Long v. Ricketts*, 2 Sim. and Stu. 183.) And the general rule of common law is, that legacies, or portions, charged on lands, do not vest till the time of payment comes. (*Harvey v. Aston*, 1 Atk. 378, 379; *S. C.* Willes, 91; *Harrison v. Naylor*, 2 Cox, 248.) But a testator may make a legacy vested and transmissible, though charged on a real estate, and payable at a future time, provided he distinctly expresses himself to that effect, or the context of the will affords a plain implication that such was his intention. (Hargrave's note to Co. Litt. 237.) In coming to a just conclusion as to this matter, it

vested legacy, due immediately, and charged on land or money in the funds, which yield an immediate profit, *in- [* 514]
 interest shall be payable thereon from the testator's death (65); but if charged only on the personal estate, which cannot be immediately got in, it shall carry interest only from the end of the year after the death of the testator (*h*) (66).

(*h*) 2 P. Wms. 26, 27.

has been often said, it ought to be examined whether the testator has directed payment to be postponed, from a consideration of circumstances merely personal as to the legatee, or with reference to the condition of the estate to be charged, and the interests of others therein. When the direction, that the charge shall not be raised till a future day, refers to the circumstances of the person to take (as, for instance, if the charge be intended for a portion), there the construction has been, that the gift is so connected with the *purpose* for which it was given, that if such purpose fail, the land ought not to be charged: but it has been as repeatedly said, a legacy vests immediately in interest, though it be charged on lands, if the time of payment appears to have been postponed only out of regard to the circumstances of the estate. (*Lowther v. Condon*, 2 Atk. 128; *Dawson v. Killet*, 1 Br. 123; *Godwin v. Munday*, Ibid. 194; *Smith v. Partridge*, Ambl. 267; *Sherman v. Collins*, 3 Atk. 320.)

(65) The old authorities are in conformity with the text, and hold, that, where a fund, of whatever nature, upon which a testator has charged legacies, is carrying interest, there, interest shall be payable upon the legacies, from the time of the testator's death. But that is exploded now by every day's practice. Though a testator may have left no other property than money in the funds, interest upon the pecuniary legacies he has charged thereon is now never given till the

end of a year after his death. (*Gibson v. Bott*, 7 Ves. 97.) The rule is different with respect to legacies charged on land. Whether the reason assigned for this distinction, in the text, and in *Maxwell v. Wettenhall*, (1 P. Wms. 25,) be the true one, has been doubted: a fund, consisting of personalty, may be "yielding immediate profits," as well as lands, but, it is obvious that the reason of the rule as to the commencement of interest upon legacies given out of personal estate, which is a rule adopted merely for convenience, (*Garthshore v. Chalie*, 10 Ves. 13; *Wood v. Penoyre*, 13 Ves. 333,) cannot apply to the case of legacies not dependent on the getting in of the personal estate, and charged upon lands only; in such case, interest, it has been said, must be chargeable from the death of the testator, or not at all. (*Pearson v. Pearson*, 1 Sch. & Lef. 11; *Spurway v. Glyn*, 9 Ves. 486; *Shirt v. Westby*, 16 Ves. 396.)

(66) As a legacy, for the payment of which no other period is assigned by the will, (*Anonym.* 2 Freem. 207,) is not *due* till the end of a year after the testator's death; (*Hearle v. Greenbank*, 3 Atk. 716;) and as interest can only be claimed for non-payment of a demand actually due; it is an undisputed general rule, that although a legacy vests (where no special intention to the contrary appears) at the testator's death, (*Garthshore v. Chalie*, 10 Ves. 13,) it does not begin to carry interest till a year afterwards, unless it be charged solely on lands. (See the

Of donations
mortis causa.

Besides these formal legacies, contained in a man's will and testament, there is also permitted another death-bed

last note.) That general rule, however, has exceptions: (*Raven v. Waite*, 1 Swanst. 557; *Beckford v. Tobin*, 1 Ves. sen. 310:) a specific bequest of a *corpus* passes an immediate gift of the fund, with all its produce, from the death of the testator. (*Kirby v. Potter*, 4 Ves. 751; *Barrington v. Tristram*, 6 Ves. 349.) Another exception arises when a legacy is given to an infant by a parent, or by a benefactor who has put himself *in loco parentis*; in such case, the necessary support of the infant may require immediate payment of interest. (*Lowndes v. Lowndes*, 15 Ves. 304; *Heath v. Perry*, 3 Atk. 102; *Mitchell v. Bower*, 3 Ves. 287.) It must, however, be observed, this latter exception operates only when the child is otherwise unprovided for: when a father gives a legacy to a child, it will carry interest from the death of the testator, as a maintenance for the child, where no other fund is applicable for such maintenance; (*Carew v. Askew*, 1 Cox, 244; *Harvey v. Harvey*, 2 P. Wms. 22;) but where other means of support are provided for the child, then the legacy will not carry interest from an earlier period than it would in the case of a bequest to a perfect stranger. (*Wynch v. Wynch*, 1 Cox, 435; *Ellis v. Ellis*, 1 Sch. & Lef. 5; *Tyrrel v. Tyrrel*, 4 Ves. 5.) And the general rule as to non-payment of interest upon a legacy, before such legacy becomes due, must not be broken in upon by an exception in favour of an *adult* legatee, however nearly related to the testator; (*Raven v. Waite*, 1 Swanst. 588;) nor, as illegitimate children are no more, in legal contemplation, than strangers, (*Lowndes v. Lowndes*, 15 Ves. 304,) will interest be allowed, by way of maintenance for such legatees; (*Perry v. Whitehead*, 6 Ves. 547;) unless it can be satisfactorily collected from

the will, that the testator intended to give interest. (*Beckford v. Tobin*, 1 Ves. sen. 310; *Ellis v. Ellis*, 1 Sch. & Lef. 6; *Newman v. Bateson*, 3 Swanst. 690.) Even in the case of a grandchild, an executor must not take upon himself to pay interest upon a legacy by way of maintenance, when that is not expressly provided by the will; for, though a court of equity will struggle in favour of the grandchild, (*Crickett v. Dolby*, 3 Ves. 12; *Collis v. Blackburn*, 9 Ves. 470,) yet, it seems, there must be something more than the mere gift of a legacy, something indicating that the testator put himself *in loco parentis*, to justify a court in decreeing interest for a grandchild's maintenance. (*Perry v. Whitehead*, 6 Ves. 547; *Rawlins v. Goldtrap*, 5 Ves. 443; *Hill v. Hill*, 3 Ves. & Bea. 186.) But, of course, even when a legacy to a grandchild will never become due unless he attains his majority, still, maintenance may be allowed for his support during his infancy, provided the parties to whom the legacy is given over in case of the infant's death, are competent, and willing, to consent. (*Cavendish v. Mercer*, 5 Ves. 195, in note.) Under any other circumstances, when a legacy to infants is not given absolutely, and in all events, but is either not to vest till a given period, or is subject to being divested by certain contingencies, upon the occurrence of which it is given over; (*Errington v. Chapman*, 12 Ves. 25;) if the words of the will do not authorise the application of interest to the maintenance of the infant legatees, a court of equity never goes further than to say that, if it can collect before it all the individuals who may be entitled to the fund, so as to make each a compensation for taking from him part, it will grant an allowance for maintenance; (*Errat v.*

disposition of property ; which is called a donation *causa mortis*. And that is, when a person in his last sickness, apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods, (under which have been included bonds, and bills drawn by the deceased upon his banker,) to keep in case of his decease. This gift, if the donor dies, needs not the assent of his executor : yet it shall not prevail against creditors ; and is accompanied with this implied trust, that, if the donor lives, the property thereof shall revert to himself, being only given in contemplation of death, or *mortis causa* (i) (67).

(i) Prec. Chanc. 269 ; 1 P. Wms. 406, 441 ; 3 P. Wms. 357.

Barlow, 14 Ves. 203 ; *Marshall v. Holloway*, 2 Swanst. 436 ; *Ex parte Whitehead*, 2 Younge & Jerv. 249,) or, where there is no gift over, and all the children of a family are to take equally, there, although other children may possibly come *in esse* after the order made, yet, all the children, born or to be born, will be held to have a common interest ; and therefore, the interest of the fund, as far as it may be requisite, will be applicable for maintenance. (*Fairman v. Green*, 10 Ves. 48 ; *Greenwell v. Greenwell*, 5 Ves. 199 ; *Errat v. Barlow*, 14 Ves. 204 ; *Haley v. Bannister*, 4 Mad. 280.) But, if the will contain *successive limitations*, under which persons of another family, and not in being, may become entitled ; it is not sufficient that all parties, presumptively entitled, then living, are before the court ; for none of the living may be the parties who, eventually, may become entitled to the property. In such a case, an order for interest by way of maintenance might be, in effect, to give to one person the property of another. (*Marshall v. Holloway*, 2 Swanst. 436 ; *ex parte Kebble*, 11 Ves. 606.)

No exception is to be made, in favour of the testator's wife, to the general rule that, a pecuniary legacy does not

bear interest before the time when the principal ought to be paid, unless a distinct intention to give interest from an earlier period can be fairly collected from the words of the testator's will. (*Stent v. Robinson*, 12 Ves. 461 ; *Lowndes v. Lowndes*, 15 Ves. 304 ; *Raven v. Waite*, 1 Swanst. 559.)

Great part of this note is extracted from 1 Hovenden's Suppl. to Ves. jun. Rep. 144, 145.

(67) A *donatio mortis causa* has many of the properties of a legacy ; it is liable to debts, and is dependent on survivorship. (*Tate v. Hilbert*, 2 Ves. jun. 120 ; *Jones v. Selby*, Prec. in Cha. 303 ; *Miller v. Miller*, 3 P. Wms. 357.) It is not a present absolute gift, vesting immediately, but a revocable and conditional one, of which the enjoyment is postponed, till after the giver's death. (*Walter v. Hodge*, 2 Swanst. 98.) On the other hand, though liable to be defeazanced, it must, subject to such power of revocation, be a complete gift *inter vivos*, and therefore requires no probate ; (*Ward v. Turner*, 2 Ves. sen. 435 ; *Ashton v. Dawson*, Sel. Ca. in Cha. 14 ;) though a question has been made whether, as such a gift is only to take effect in case of the donor's death, it ought not to be held so far testamentary as to be li-

This method of donation might have subsisted in a state of nature, being always accompanied with delivery of actual

able to legacy duty. (*Woodbridge v. Spooner*, 3 Barn. & Ald. 236.)

A *donatio mortis causa* plainly differs from a legacy in this particular,—the subject of gift must in the former case be delivered *by the donor*; in the latter case, *by his representative*. (*Walter v. Hodge*, 2 Swanst. 98.) So, the distinction between a nuncupative will, and a *donatio mortis causa* is, that the bounty given in the first-named mode is to be received from the executor; but in the latter case may be held against him, and requires no assent on his part, the delivery having been completed by the donor himself. (*Duffield v. Elwes*, 1 Sim. & Stu. 244; *Ward v. Turner*, 2 Ves. sen. 443.) The greater number of cases upon this subject have turned on the question of actual tradition of the gift; the general rule, according to which delivery is necessary, is never now disputed; but whether such delivery has, or has not, been legally completed, or whether the nature of the gift constitutes an exception, exempting it from the general rule, are points which still, not unfrequently, present debateable ground. (*Tate v. Hilbert*, 2 Ves. jun. 120; *Lawson v. Lawson*, 1 P. Wms. 441.) Where actual tradition is impracticable, if the donor proceed as far as the nature of the subject admits towards a transfer of the possession, effect may be given to his intended bounty; thus, a ship at sea has been held to be virtually delivered by a delivery of the bill of sale thereof, defeasible on the donor's recovery; and delivery of the key of a warehouse, or of a trunk, has been determined to be a sufficient delivery of the goods in such warehouse, and of the contents of the trunk; for, in these instances, the bill of sale and the keys were not considered as mere symbols, but as

the means of obtaining possession of the property. (*Brown v. Williams*, cited in 2 Ves. sen. 434; *Jones v. Selby*, as cited Ibid. p. 441.) A mere symbolical delivery, however, will not be sufficient; therefore, there can be no *donatio mortis causa* of a simple contract debt; (*Gardner v. Parker*, 3 Mad. 185;) though there may of a bond; (*Snellgrove v. Bailey*, 3 Atk. 214;) for, notwithstanding it is a *chose en action*, some property is conveyed by the delivery. (*Ward v. Turner*, 2 Ves. sen. 442.) But, the case of a bond-debt is an exception, not a rule; and where a bond is only a collateral security for a mortgage debt, the delivery of the bond will not be a complete gift of the mortgage. (*Duffield v. Elwes*, 1 Sim. & Stu. 244.) A cheque drawn by the donor on a banker, (*Tate v. Hilbert*, 4 Br. 291,) or a promissory note payable to him, (*Miller v. Miller*, 3 P. Wms. 357,) cannot, it seems, be disposed of by way of *donatio mortis causa*; no banker, indeed, is justified in paying a cheque after the death of the drawer; and a promissory note, not being a negotiable security payable to the bearer, must come under the same consideration as any other simple contract debt; and as the amount thereof could only be sued for in the name of the executors, that seems a sufficient reason why it could not be made the subject of a *donatio mortis causa*. (*Miller v. Miller*, 3 P. Wms. 357.) It is to be observed, that although there may have been a complete delivery of the gift, yet, if the possession be not continued in the donee, but the donor resume it, the gift (whether such resumption of possession be intended to have that effect, or not,) is at an end. (*Bunn v. Markham*, 7 Taunt. 232; *S. C.* 2 Marsh. 539.)

possession (*k*); and so far differs from a testamentary disposition: but seems to have been handed to us from the civil lawyers (*l*), who themselves borrowed it from the Greeks (*m*).

7. When all the debts and particular legacies are discharged, the surplus or *residuum* must be paid to the residuary legatee, if any be appointed by the will; and if there be none, it was long a settled notion that it devolved to the executor's own use, by virtue of his executorship (*n*). But whatever ground there might have been formerly for this opinion, it seems now to be understood (*o*) with this restriction: that, although where the executor has no legacy at all, the *residuum* shall in general be his own, yet wherever there is sufficient *on the face of a will (by means of a competent legacy or otherwise), to imply that the testator intended his executor should *not* have the residue, the undivided surplus of the estate shall go to the next of kin (68), the

7. After payment of debts and legacies, the residue of the testator's estate must be paid to the residuary legatee, if any.

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(*k*) Law of Forfeiture, 16.

(*l*) Inst. 2, 7, 1; Ff. l. 39, t. 6.

(*m*) There is a very complete *donatio mortis causa*, in the *Odyssey*, b. 17, v. 78, made by Telemachus to his friend Pyraeus; and another by Hercules, in the *Alcestes* of Euripides, v. 1020.

pides, v. 1020.

(*n*) Perkins, 525.

(*o*) Prec. Chanc. 323; 1 P. Wms. 7, 544; 2 P. Wms. 338; 3 P. Wms. 43, 194; Stra. 559; *Lawson v. Lawson*, Dom. Proc. 28 Apr. 1777.

(68) By the statute of 11 Geo. IV. and 1 Gul. IV. c. 40, it is enacted, that, executors shall be deemed by courts of equity to be trustees for the persons who would be entitled under the statute of distributions, in respect of any residue not expressly disposed by any testator's will, unless it shall appear by the will, or a codicil thereto, that the persons appointed executors were intended to take such residue beneficially. This act, therefore, very materially modifies the previous doctrines of courts of equity.

Lord Eldon said, he feared there was no possibility of denying, that parol declarations of a testator, both previous and subsequent to the time of making his will, are admissible evidence to repel a legal presumption; but, his Lordship added, such decla-

rations are not all alike weighty and efficacious; a declaration at the time of executing a will is of more consequence than a declaration made afterwards; and a declaration by the testator, subsequently to his will, as to what he *had* done, is entitled to more weight than a declaration before making his will, as to what he *intended* to do, for he may very well have altered that intention: therefore, although all such declarations are equally admissible, very different degrees of credit and weight are to be attached to them. (*Trimmer v. Bayne*, 7 Ves. 518; *Pole v. Lord Somers*, 6 Ves. 32. See also *Usticke v. Bawden*, 2 Addams, 128; *Langham v. Sandford*, 2 Meriv. 23.) As to the construction of a will in other respects, these rules are still entitled to all the respect that the

executor then standing upon exactly the same footing as an administrator, concerning whom indeed there formerly was much debate (*p*), whether or no he could be compelled to make any distribution of the intestate's estate. For, though (after the administration was taken in effect from the ordinary, and transferred to the relations of the deceased) the spiritual court endeavoured to compel a distribution, and took bonds of the administrator for that purpose, they were prohibited by the temporal courts, and the bonds declared void at law (*q*). And the right of the husband not only to administer, but also to enjoy exclusively, the effects of his deceased wife, depends still on this doctrine of the common law: the statute of frauds declaring only, that the statute of distributions does not extend to this case. But now these controversies are quite at an end: for, by the statute 22 & 23 Car. II. c. 10, explained by 29 Car. II. c. 30, it is enacted, that the surplusage of intestates' estates, (except of *femes-covert*, which are left as at common law (*r*),) shall, after the expiration of one full year from the death of the intestate, be distributed in the following manner: One third shall go to the widow of the intestate, and the residue in equal proportions to his children, or, if dead, to their

The statute of distributions.

(*p*) Godolph. p. 2, c. 32.

Wms. 447.

(*q*) 1 Lev. 233; Cart. 125; 2 P.

(*r*) Stat. 29 Car. II. c. 3, s. 25.

high authorities from which they are derived ever conferred upon them: but, since the statute already cited, no parol evidence can be admitted in support of an executor's claim to a residue not disposed of by his testator's will.

Executors can only support their claims by showing an intention, apparent upon the face of their testator's will, that any residue of his personal estate not expressly disposed of should belong to them beneficially: or by proving that there are no persons in existence who would be entitled under the statute of distributions to such residue.

Numerous cases have fully established, as a general rule, that testamentary words of recommendation,

request, or confidence, are imperative, and raise a trust; (*Paul v. Compton*, 8 Ves. 380; *Taylor v. George*, 2 Ves. & Bea. 378; *Parsons v. Baker*, 18 Ves. 476; *Kirkbank v. Hudson*, 7 Pr. 220;) and although the testator's object fails; or is contrary to the policy of the law; or is too vaguely expressed to be capable of being carried into execution; yet, as it was the intent that the executor should only take as trustee, the necessary legal consequence, even before the late statute, was, that there must be a resulting trust for the testator's next of kin. (*Morice v. The Bishop of Durham*, 9 Ves. 405; *James v. Allen*, 3 Meriv. 19; *Vezey v. Jamson*, 1 Sim. & Stu. 71; *Paice v. The Archbishop of Canterbury*, 14 Ves. 370).

representatives: that is, their lineal descendants: if there are no children or legal representatives subsisting, then a moiety shall go to the widow, and a moiety to the next of kindred in equal degree and their representatives: if no widow, the whole shall go to the children: if neither widow nor children, the whole shall be distributed among the next of kin in equal degree and their representatives: but no representatives are admitted, among collaterals, farther than the children of the intestate's brothers and sisters (s). The next of kindred, here referred to, are to be investigated by the same rules of consanguinity, as those who are entitled to letters of administration; of whom we have sufficiently spoken (t). *And therefore by this statute the mother, as well as the father, succeeded to all the personal effects of their children, who died intestate and without wife or issue: in exclusion of the other sons and daughters, the brothers and sisters of the deceased. And so the law still remains with respect to the father; but by statute 1 Jac. II. c. 17, if the father be dead, and any of the children die intestate without wife or issue, in the lifetime of the mother, she and each of the remaining children, or their representatives, shall divide his effects in equal portions (70). [* 516]

It is obvious to observe, how near a resemblance this statute of distributions bears to our ancient English law, *de rationabili parte bonorum*; spoken of at the beginning of this chapter (u); and which Sir Edward Coke (w) himself, though he doubted the generality of its restraint on the

Resemblance of
this statute to
our ancient Eng-
lish law.

(s) Raym. 496; Lord Raym. 571.

(u) Pag. 492.

(t) Page 504.

(w) 2 Inst. 33. See 1 P. Wms. 8.

(70) Mr. Christian observes, that "the next of kin, who are to have the benefit of the statute of distributions, must be ascertained according to the computation of the civil law, including the relations both on the paternal and maternal sides.

"And when relations are thus found who are distant from the intestate by an equal number of degrees, they will share the personal property equally, although they are relations to the intestate of very different denominations, and perhaps not relations to

each other. There is only one exception to this rule, *viz.* where the nearest relations are a grandfather or grandmother, and brothers or sisters, although all these are related in the second degree, yet the former shall not participate with the latter; for which singular exception it does not appear that any good reason can be given. (3 Atk. 762.) No difference is made between the whole and half blood in the distribution of intestate personal property."

power of devising by will, held to be universally binding (in point of conscience at least) upon the administrator or executor, in the case of either a total or partial intestacy. It also bears some resemblance to the Roman law of succession *ab intestato* (x); which, and because the act was also penned by an eminent civilian (y), has occasioned a notion that the parliament of England copied it from the Roman prætor: though, indeed, it is little more than a restoration, with some refinements and regulations, of our old constitutional law; which prevailed as an established right and custom from the time of king Canute downwards, many centuries before Justinian's laws were known or heard of in the western parts of Europe. So, likewise, there is another part of the statute of distributions, where directions are given that no child of the intestate (except his heir-at-law) on whom he settled in his lifetime any estate in lands, or pecuniary portion, equal to the distributive shares of the other children, shall have any part of the surplusage with their *brothers and sisters; but, if the estates so given them, by way of advancement, are not quite equivalent to the other shares, the children so advanced shall now have so much as will make them equal. This just and equitable provision hath been also said to be derived from the *collatio bonorum* of the imperial law (z): which it certainly resembles in some points, though it differs widely in others. But it may not be amiss to observe, that with regard to goods and chattels, this is part of the ancient custom of London, of the province of York, and of our sister kingdom of Scotland: and, with regard to lands descending in co-parcenary, that it hath always been, and still is, the common law of England, under the name of *hotchpot* (a) (71).

(x) The general rule of such successions was this: 1. The children or lineal descendants in equal portions. 2. On failure of these, the parents or lineal ascendants, and with them the brethren or sisters of the whole blood; or, if the parents were dead, all the brethren and sisters, together with the representatives of a brother

or sister deceased. 3. The next collateral relations in equal degree. 4. The husband or wife of the deceased. (Ff. 38, 15, 1; Nov. 118, c. 1, 2, 3; 127, c. 1.)

(y) Sir Walter Walker. Lord Raym. 574.

(z) Ff. 37, 6, 1.

(a) See ch. 12, page 191.

(71) See *ante*, pp. 190, 493, with the notes.

Before I quit this subject, I must, however, acknowledge, that the doctrine and limits of representation laid down in the statute of distributions, seem to have been principally borrowed from the civil law: whereby it will sometimes happen, that personal estates are divided *per capita*, and sometimes *per stirpes*; whereas the common law knows no other rule of succession but that *per stirpes* only (*b*). They are divided *per capita*, to every man an equal share, when all the claimants claim in their own rights, as in equal degree of kindred, and not *jure repræsentationis*, in the right of another person. As, if the next of kin be the intestate's three brothers, A., B., and C.; here his effects are divided into three equal portions, and distributed *per capita*, one to each: but, if one of these brothers, A., had been dead, leaving three children, and another, B., leaving two; then the distribution must have been *per stirpes*; viz. one third to A.'s three children, another third to B.'s two children, and the remaining third to C. the surviving brother: yet, if C. had also been dead, without issue, then A.'s and B.'s five children, being all in equal degree to the intestate, would take in their own rights *per capita*; viz. each of them one fifth part (*c*) (72).

The doctrine and limits of representation laid down in the statute of distributions, borrowed from the civil law.

The statute of distributions expressly excepts and reserves the customs of the city of London, of the province of York, *and of all other places having peculiar customs of distri-

Exceptions in favour of local customs.

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(*b*) See ch. 14, page 217.

(*c*) Prec. Chanc. 54.

(72) Representations of lineal descendants are admitted to the remotest degree. (*Carter v. Crawley*, T. Raym. 500;) but the 7th section of the statute of distributions provides, that "no representations shall be admitted amongst collaterals after brothers' and sisters' children." This proviso has been construed to mean brothers and sisters *of the intestate*, and not as admitting representation, when the distribution happens to fall among brothers and sisters who are only remotely related to the intestate. The reasonableness of this construction of the act was demonstrated by powerful arguments, in the case of *Carter v.*

Crawley before cited: and was admitted in *Pett v. Pett*, (Comyns, 87; S. C. 1 P. Wms. 27,) in the *Anonymous case*, in Appendix to 2 Freem. 298, and in *Bowers v. Littlewood*, (1 P. Wms. 594.)

In a question of distribution, the next of kin to an intestate, though such next of kin be a collateral relative only, may, since the statute of Cha. II. be referred to a more remote lineal relation in the ascending line; but, between relatives in equal degree, a lineal will be preferred to a collateral claimant. (*Blackborough v. Davis*, 1 P. Wms. 50.)

buting intestates' effects. So that, though in those places the restraint of devising is removed by the statutes formerly mentioned(*d*), their ancient customs remain in full force, with respect to the estates of intestates. I shall, therefore, conclude this chapter, and with it the present book, with a few remarks on those customs.

Of the distribution of the effects of an intestate, by the customs of London and York, and also in Scotland and Wales.

In the first place we may observe, that, in the city of London (*e*), and province of York (*f*), as well as in the kingdom of Scotland (*g*), and probably also in Wales, (concerning which there is little to be gathered, but from the statute 7 & 8 W. III. c. 38,) the effects of the intestate, after payment of his debts, are in general divided according to the ancient universal doctrine of the *pars rationabilis*. If the deceased leaves a widow and children, his substance (deducting for the widow her apparel and the furniture of her bedchamber, which in London is called the *widow's chamber*) is divided into three parts; one of which belongs to the widow, another to the children, and the third to the administrator: if only a widow, or only children, they shall respectively, in either case, take one moiety, and the administrator the other (*h*); if neither widow nor child, the administrator shall have the whole (*i*). And this portion, or *dead man's part*, the administrator was wont to apply to his own use (*k*), till the statute 1 Jac. II. c. 17, declared that the same should be subject to the statute of distributions. So that if a man dies worth 1,800*l.* personal estate, leaving a widow and two children, this estate shall be divided into eighteen parts; whereof the widow shall have eight, six by the custom and two by the statute; and each of the children five, three by the custom and two by the statute: if he leaves a widow and one child, she shall still have eight parts, as before; and the child shall have ten, six by the custom and four by the statute: if he leaves a widow and no child, the widow shall have three-fourths of the whole, two by the custom and one by * the statute; and the remaining fourth shall go by the statute to the next of kin. It is also to be observed, that, if the wife be provided for by a jointure before marriage, in bar of her customary part, it puts her in a state of non-entity, with re-

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(*d*) Page 493.

(*e*) Lord Raym. 1329.

(*f*) 2 Burn, Eccl. Law, 746.

(*g*) Ibid. 782.

(*h*) 1 P. Wms. 341; Salk. 246.

(*i*) 2 Show. 175.

(*k*) 2 Freem. 85; 1 Vern. 133.

gard to the custom only (*l*); but she shall be entitled to her share of the dead man's part under the statute of distributions, unless barred by special agreement (*m*). And if any of the children are advanced by the father, in his lifetime, with any sum of money (not amounting to their full proportionable part), they shall bring that portion into hotchpot with the rest of the brothers and sisters, but not with the widow (73), before they were entitled to any benefit under the custom (*n*): but, if they are fully advanced, the custom entitles them to no further dividend (*o*).

Thus far in the main the customs of London and of York agree; but, besides certain other less material variations, there are two principal points in which they considerably differ. One is, that in London the share of the children (or orphanage part) is not fully vested in them till the age of twenty-one, before which they cannot dispose of it by testament (*p*): and, if they die under that age, whether sole or married, their share shall survive to the other children; but after the age of twenty-one, it is free from any orphanage custom, and, in case of intestacy, shall fall under the

Of the difference between the customs of London and of York.

(*l*) 2 Vern. 665; 3 P. Wms. 16.

155; 2 P. Wms. 526.

(*m*) 1 Vern. 15; 2 Chan. Rep. 252.

(*o*) 2 P. Wms. 527.

(*n*) 2 Freem. 279; 1 Eq. Cas. Abr.

(*p*) 2 Vern. 558.

(73) Advances which an intestate has made to any of his children, are never brought into hotch-pot for the benefit of his widow; (*Kirkcudbright v. Kirkcudbright*, 8 Ves. 64;) but solely with a view to equality as amongst the children; (*Gibbons v. Caunt*, 4 Ves. 847;) and in cases arising upon the custom of London, the effect of the full advancement of one child is merely to remove that child out of the way, and to increase the shares of the others. (*Folkes v. Western*, 9 Ves. 460.) So, when a settlement bars, or makes a composition for, the wife's customary share, that share, if the husband die intestate, will be distributable as if he had left no wife; (*Knipe v. Thornton*, 2 Eden, 121; *Morris v. Burrows*, 2

Atk. 629; *Read v. Snell*, Ibid. 644;) and will not go to increase what is called "the dead man's part," (*Medcalfe v. Ives*, 1 Atk. 63,) to a distributive share of which the widow would be entitled, notwithstanding she had compounded for her customary part; (*Whithill v. Phelps*, Prec. in Cha. 328;) unless the expressed, or clearly implied, intention was, that she should be barred as well of her share of the dead man's part, as of her share by the custom. (*Benson v. Bellasis*, 1 Vern. 16.) A jointure in bar of dower, without saying more, will be no bar of a widow's claim to a customary share of personal estate; for dower affects lands only, and land is wholly out of the custom. (*Babington v. Greenwood*, 1 P. Wms. 531.)

statute of distributions (*q*). The other, that in the province of York, the heir at common law, who inherits any land either in fee or in tail, is excluded from any filial portion or reasonable part (*r*). But, notwithstanding these provincial variations, the customs appear to be substantially one and the same. And, as a similar policy formerly prevailed in every part of the island, we may fairly conclude the whole to be of British original; or, if derived from the Roman law of successions, to have been drawn from that fountain much earlier than the time of Justinian, from whose constitutions [* 520] in many points *(particularly in the advantages given to the widow) it very considerably differs; though it is not improbable that the resemblances which yet remain may be owing to the Roman usages; introduced in the time of Claudius Cæsar, who established a colony in Britain to instruct the natives in legal knowledge (*s*); inculcated and diffused by Papinian, who presided at York as *præfectus prætorio*, under the emperors Severus and Caracalla (*t*); and continued by his successors till the final departure of the Romans in the beginning of the fifth century after Christ.

(*q*) Prec. Chan. 537.

(*s*) Tacit. Annal. l. 12, c. 32.

(*r*) 2 Burn, 754.

(*t*) Selden, in Fletam, cap. 4, s. 3.

THE END OF THE SECOND BOOK.

Joseph H. Hooley

APPENDIX.

No. I.

No. I.

VETUS CARTA FEOFFAMENTI.

SCIANT presentes et futuri, quod ego Willielmus, filius Williem de Segenho, dedi, concessi, et hac presenti carta mea confirmavi, Johanni quondam filio Johannis de Saleford, pro quadam summa pecunie quam michi dedit pre manibus, unam acram terre mee arabilis, jacentem in campo de Saleford, juxta terram quondam Richardi de la Mere: **HABENDAM ET TENENDAM** totam predictam acram terre, cum omnibus ejus pertinentiis, prefato Johanni, et heredibus suis, et suis assignatis, de capitalibus dominis feodi: **REDDENDO** et faciendo annuatim eisdem dominis capitalibus servitia inde debita et consueta: Et ego predictus Willielmus, et heredes mei, et mei assignati, totam predictam acram terre, cum omnibus suis pertinentiis, predicto Johanni de Saleford, et heredibus suis, et suis assignatis, contra omnes gentes warrantizabimus in perpetuum. **IN CUJUS** rei testimonium huic presenti carte sigillum meum apposui: **HIIS** testibus, Nigello de Saleford, Johanne de Seybroke, Radulpho clerico de Saleford, Johanne molendario de eadem villa, et aliis. **DATA** apud Saleford die Veneris proximo ante festum sancte Margarete virginis, anno regni regis **EDWARDI** filii regis **EDWARDI** sexto.

(L. S.)

MEMORANDUM, quod die et anno infrascriptis plena et pacifica seisinā acre infraspacificate, cum pertinentiis, data et deliberata fuit per infranominatum Willielmum de Segenho infranominato Johanni de Saleford, in propriis personis suis, secundum tenorem et effectum carte infrascripte, in presentia Nigelli de Saleford, Johannis de Seybroke, et aliorum.

Livery of seisin
endorsed.

No. II.

No. II.

A MODERN CONVEYANCE BY LEASE AND RELEASE.

SECT. 1. LEASE OR BARGAIN AND SALE, FOR A YEAR.

THIS INDENTURE, made the third day of September, the twenty-first year of the reign of our sovereign lord **GEORGE** the second, by the grace of God king of Great Britain, France, and Ireland, defender of the faith, and so forth, and in the year of our Lord one thousand seven hundred and forty-seven, between Abraham Barker, of Dale Hall, in the county of Norfolk,

Premises.
Parties.

No. II. { Consideration. Bargain and sale. Parcels. Habendum. Reddendum. Intent. Conclusion.	esquire, and Cecilia his wife, of the one part, and David Edwards, of Lincoln's Inn, in the county of Middlesex, esquire, and Francis Golding, of the city of Norwich, clerk, of the other part, witnesseth; that the said Abraham Barker, and Cecilia his wife, in consideration of five shillings of lawful money of Great Britain, to them in hand paid by the said David Edwards and Francis Golding, at, or before, the ensealing and delivery of these presents, (the receipt whereof is hereby acknowledged,) and for other good causes and considerations, them the said Abraham Barker and Cecilia his wife, hereunto specially moving, HAVE bargained and sold, and by these presents do, and each of them doth, bargain and sell, unto the said David Edwards and Francis Golding, their executors, administrators, and assigns, ALL that the capital messuage, called Dale Hall, in the parish of Dale, in the said county of Norfolk, wherein the said Abraham Barker and Cecilia his wife now dwell, and all those their lands in the said parish of Dale, called or known by the name of Wilson's farm, containing by estimation five hundred and forty acres, be the same more or less, together with all and singular houses, dove-houses, barns, buildings, stables, yards, gardens, orchards, lands, tenements, meadows, pastures, feedings, commons, woods, underwoods, ways, waters, watercourses, fishings, privileges, profits, easements, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the said capital messuage and farm belonging or appertaining, or with the same used or enjoyed, or accepted, reputed, taken, or known, as part, parcel, or member thereof, or as belonging to the same, or any part thereof; and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits, thereof, and of every part and parcel thereof: TO HAVE AND TO HOLD the said capital messuage, lands, tenements, hereditaments, and all and singular other the premises hereinbefore mentioned, or intended to be bargained and sold, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, unto the said David Edwards and Francis Golding, their executors, administrators, and assigns, from the day next before the day of the date of these presents, for and during, and unto the full end and term of, one whole year from thence next ensuing, and fully to be complete and ended: YIELDING and paying, therefore, unto the said Abraham Barker, and Cecilia his wife, and their heirs and assigns, the yearly rent of one pepper-corn at the expiration of the said term, if the same shall be lawfully demanded: TO THE INTENT and purpose that, by virtue of these presents, and of the statute for transferring uses into possession, the said David Edwards and Francis Golding may be in the actual possession of the premises, and be thereby enabled to take and accept a grant and release of the freehold, reversion, and inheritance of the same premises, and of every part and parcel thereof, to them, their heirs and assigns; to the uses and upon the trusts, thereof to be declared by another indenture, intended to bear date the next day after the day of the date hereof. IN WITNESS whereof,
---	---

the parties to these presents their hands and seals have subscribed and set, the day and year first above written.

No. II.

Sealed and delivered, being first	}	Abraham Barker. (L.S.)
duly stamped, in the pre-		Cecilia Barker. (L.S.)
sence of		David Edwards. (L.S.)
George Carter.		Francis Golding. (L.S.)
William Browne.		

SECT. 2. DEED OF RELEASE.

THIS INDENTURE of five parts, made the fourth day of Premises.
 September, in the twenty-first year of the reign of our sovereign
 lord GEORGE the second, by the grace of God king of Great
 Britain, France, and Ireland, defender of the faith, and so forth,
 and in the year of our Lord one thousand seven hundred and
 forty-seven, between Abraham Barker, of Dale Hall, in the Parties.
 county of Norfolk, esquire, and Cecilia his wife, of the first part;
 David Edwards, of Lincoln's Inn, in the county of Middlesex,
 esquire, executor of the last will and testament of Lewis Ed-
 wards, of Cowbridge, in the county of Glamorgan, gentleman,
 his late father, deceased, and Francis Golding, of the city of
 Norwich, clerk, of the second part; Charles Browne, of En-
 stone, in the county of Oxford, gentleman, and Richard More,
 of the city of Bristol, merchant, of the third part; John Barker,
 esquire, son and heir apparent of the said Abraham Barker, of
 the fourth part; and Katherine Edwards, spinster, one of the
 sisters of the said David Edwards, of the fifth part. Recital.
 WHEREAS a marriage is intended, by the permission of God, to be shortly
 had and solemnized between the said John Barker and Katherine
 Edwards: NOW THIS INDENTURE WITNESSETH, that in con- Consideration.
 sideration of the said intended marriage, and of the sum of five
 thousand pounds, of good and lawful money of Great Britain,
 to the said Abraham Barker, (by and with the consent and
 agreement of the said John Barker and Katherine Edwards,
 testified by their being parties to, and their sealing and delivery
 of, these presents,) by the said David Edwards in hand paid, at
 or before the ensealing and delivery hereof, being the marriage
 portion of the said Katherine Edwards, bequeathed to her by
 the last will and testament of the said Lewis Edwards, her late
 father, deceased; the receipt and payment whereof the said
 Abraham Barker doth hereby acknowledge, and thereof, and of
 every part and parcel thereof, they the said Abraham Barker,
 John Barker, and Katherine Edwards, do, and each of them doth,
 release, acquit, and discharge the said David Edwards, his execu-
 tors and administrators, for ever by these presents: and for pro-
 viding a competent jointure and provision of maintenance for the
 said Katherine Edwards, in case she shall, after the said intended
 marriage had, survive and overlive the said John Barker, her in-
 tended husband: and for settling and assuring the capital mes-
 suage, lands, tenements, and hereditaments, hereinafter mentioned,
 unto such uses, and upon such trusts, as are hereinafter ex-
 pressed and declared: and for and in consideration of the sum

No. II.

Release.

Parcels.

Mention of bargain and sale.

Habendum.

To the use of the grantors till marriage :

Then of the hus-

of five shillings, of lawful money of Great Britain, to the said Abraham Barker and Cecilia his wife, in hand paid by the said David Edwards and Francis Golding, and of ten shillings of like lawful money to them also in hand paid by the said Charles Browne and Richard More, at or before the ensealing and delivery hereof, (the several receipts whereof are hereby respectively acknowledged,) they the said Abraham Barker and Cecilia his wife, HAVE, and each of them hath, granted, bargained, sold, released, and confirmed, and by these presents do, and each of them doth, grant, bargain, sell, release, and confirm unto the said David Edwards and Francis Golding, their heirs and assigns, ALL that the capital messuage called Dale Hall, in the parish of Dale, in the said county of Norfolk, wherein the said Abraham Barker and Cecilia his wife now dwell, and all those their lands in the said parish of Dale, called or known by the name of Wilson's farm, containing by estimation, five hundred and forty acres, be the same more or less, together with all and singular houses, dove-houses, barns, buildings, stables, yards, gardens, orchards, lands, tenements, meadows, pastures, feedings, commons, woods, underwoods, ways, waters, watercourses, fishings, privileges, profits, easements, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the said capital messuage and farm belonging or appertaining, or with the same used or enjoyed, or accepted, reputed, taken, or known, as part, parcel, or member thereof, or as belonging to the same or any part thereof; (all which said premises are now in the actual possession of the said David Edwards and Francis Golding, by virtue of a bargain and sale to them thereof made by the said Abraham Barker and Cecilia his wife, for one whole year, in consideration of five shillings to them paid by the said David Edwards and Francis Golding, in and by one indenture, bearing date the day next before the day of the date hereof, and by force of the statute for transferring uses into possession;) and the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits thereof, and every part and parcel thereof, and also all the estate, right, title, interest, trust, property, claim, and demand whatsoever, both at law and in equity, of them the said Abraham Barker and Cecilia his wife, in, to, or out of the said capital messuage, lands, tenements, hereditaments, and premises: TO HAVE AND TO HOLD the said capital messuage, lands, tenements, hereditaments, and all and singular other the premises hereinbefore mentioned to be hereby granted and released, with their and every their appurtenances, unto the said David Edwards and Francis Golding, their heirs and assigns, to such uses, upon such trusts, and to and for such intents and purposes, as are hereinafter mentioned, expressed, and declared, of and concerning the same: that is to say, to the use and behoof of the said Abraham Barker and Cecilia his wife, according to their several and respective estates and interests therein, at the time of, or immediately before, the execution of these presents, until the solemnization of the said intended marriage:

and from and after the solemnization thereof, to the use and behoof of the said John Barker, for and during the term of his natural life; without impeachment of or for any manner of waste: and from and after the determination of that estate, then to the use of the said David Edwards and Francis Golding and their heirs, during the life of the said John Barker, upon trust to support and preserve the contingent uses and estates hereinafter limited from being defeated and destroyed, and for that purpose to make entries, or bring actions, as the case shall require; but, nevertheless, to permit and suffer the said John Barker, and his assigns, during his life, to receive and take the rents and profits thereof, and of every part thereof, to and for his and their own use and benefit: and from and after the decease of the said John Barker, then to the use and behoof of the said Katherine Edwards, his intended wife, for and during the term of her natural life, for her jointure and in lieu, bar, and satisfaction of her dower and thirds at common law, which she can or may have or claim, of, in, to, or out of, all and every, or any of the lands, tenements, and hereditaments, whereof or wherein the said John Barker now is, or at any time or times hereafter during the coverture between them shall be, seised of any estate of freehold or inheritance; and from and after the decease of the said Katherine Edwards, or other sooner determination of the said estate, then to the use and behoof of the said Charles Browne and Richard More, their executors, administrators, and assigns, for and during and unto the full end and term of five hundred years from thence next ensuing, and fully to be complete and ended, without impeachment of waste: upon such trusts nevertheless, and to and for such intents and purposes, and under and subject to such provisions and agreements, as are hereinafter mentioned, expressed, and declared of and concerning the same: and from and after the end, expiration, or other sooner determination of the said term of five hundred years, and subject thereunto, to the use and behoof of the first son of the said John Barker on the body of the said Katherine Edwards his intended wife to be begotten, and of the heirs of the body of such first son lawfully issuing: and for default of such issue, then to the use and behoof of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and of all and every other the son and sons of the said John Barker on the body of the said Katherine Edwards his intended wife to be begotten, severally, successively, and in remainder, one after another, as they and every of them shall be in seniority of age, and priority of birth, and of the several and respective heirs of the body and bodies of all and every such son and sons lawfully issuing; the elder of such sons, and the heirs of his body issuing, being always to be preferred and to take before the younger of such sons, and the heirs of his or their body or bodies issuing: and for default of such issue, then to the use and behoof of all and every the daughter and daughters of the said John Barker on the body of the said Katherine Edwards his intended wife to be begotten, to be equally divided between

No. II.

band for life,
sans waste:Remainder to
trustees to pre-
serve contingent
remainders:Remainder to the
wife for life, for
her jointure, in
bar of dower:Remainder to
other trustees
for a term, upon
trusts after men-
tioned:Remainder to
the first and
other sons of the
marriage in
tail:Remainder to
the daughters,

No. II.

as tenants in
common, in tail :

Remainder to
the husband in
tail :

Remainder to
the husband's
mother in fee.

The trust of the
term declared ;

to raise portions
for younger
children,

payable at cer-
tain times,

with mainte-
nance at the
rate of 4 per
cent.

and benefit of
survivorship.

If no such child,

them (if more than one), share and share alike, as tenants in common and not as joint tenants, and of the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing ; and for default of such issue, then to the use and behoof of the heirs of the body of him the said John Barker lawfully issuing : and for default of such heirs, then to the use and behoof of the said Cecilia, the wife of the said Abraham Barker, and of her heirs and assigns for ever. AND as to, for, and concerning the term of five hundred years hereinbefore limited to the said Charles Browne and Richard More, their executors, administrators, and assigns, as aforesaid, it is hereby declared and agreed by and between all the said parties to these presents, that the same is so limited to them upon the trusts, and to and for the intents and purposes, and under and subject to the provisos and agreements, hereinafter mentioned, expressed, and declared, of and concerning the same : that is to say, in case there shall be an eldest or only son and one or more other child or children of the said John Barker on the body of the said Katherine his intended wife to be begotten, then upon trust that they the said Charles Browne and Richard More, their executors, administrators, and assigns, by sale or mortgage of the said term of five hundred years, or by such other ways and means as they or the survivor of them, or the executors or administrators of such survivor, shall think fit, shall and do raise and levy, or borrow and take up at interest, the sum of four thousand pounds of lawful money of Great Britain, for the portion or portions of such other child or children (besides the eldest or only son) as aforesaid, to be equally divided between them (if more than one) share and share alike ; the portion or portions of such of them as shall be a son or sons to be paid at his or their respective age or ages of twenty-one years ; and the portion or portions of such of them as shall be a daughter or daughters to be paid at her or their respective age or ages of twenty-one years, or day or days of marriage, which shall first happen. And upon this further trust, that in the mean time and until the same portions shall become payable as aforesaid, the said Charles Browne and Richard More, their executors, administrators, and assigns, shall and do, by and out of the rents, issues, and profits of the premises aforesaid, raise and levy such competent yearly sum and sums of money for the maintenance and education of such child or children, as shall not exceed in the whole the interest of their respective portions after the rate of four pounds in the hundred yearly. Provided always, that in case any of the same children shall happen to die before his, her or their portions shall become payable as aforesaid, then the portion or portions of such of them so dying shall go and be paid unto and be equally divided among the survivor or survivors of them, when and at such time as the original portion or portions of such surviving child or children shall become payable as aforesaid. PROVIDED also, that, in case there shall be no such child or children of the said John Barker on the body of the said Katherine his intended wife begotten, besides an eldest or only

son ; or in case all and every such child or children shall happen to die before all or any of their said portions shall become due and payable as aforesaid ; or in case the said portions, and also such maintenance as aforesaid, shall by the said Charles Browne and Richard More, their executors, administrators, or assigns, be raised and levied by any of the ways and means in that behalf afore-mentioned ; or in case the same by such person or persons as shall for the time being be next in reversion or remainder of the same premises expectant upon the said term of five hundred years, shall be paid, or well and duly secured to be paid, according to the true intent and meaning of these presents ; then and in any of the said cases, and at all times thenceforth, the said term of five hundred years, or so much thereof as shall remain unsold or undisposed of for the purposes aforesaid, shall cease, determine, and be utterly void to all intents and purposes, any thing herein contained to the contrary thereof in any wise notwithstanding. PROVIDED also, and it is hereby further declared and agreed by and between all the said parties to these presents, that in case the said Abraham Barker or Cecilia his wife, at any time during their lives, or the life of the survivor of them, with the approbation of the said David Edwards and Francis Golding, or the survivor of them, or the executors and administrators of such survivor, shall settle, convey, and assure other lands and tenements of an estate of inheritance in fee-simple, in possession, in some convenient place or places within the realm of England, of equal or better value than the said capital messuage, lands, tenements, hereditaments, and premises, hereby granted and released, and in lieu and recompence thereof, unto and for such and the like uses, intents and purposes, and upon such and the like trusts, as the said capital messuage, lands, tenements, hereditaments, and premises are hereby settled and assured unto and upon, then and in such case, and at all times from thenceforth, all and every the use and uses, trust and trusts, estate and estates herein before limited, expressed, and declared of or concerning the same, shall cease, determine, and be utterly void to all intents and purposes ; and the same capital messuage, lands, tenements, hereditaments, and premises, shall from thenceforth remain and be to and for the only proper use and behoof of the said Abraham Barker or Cecilia his wife, or the survivor of them, so settling, conveying, and assuring such other lands and tenements as aforesaid, and of his or her heirs and assigns for ever ; and to and for no other use, intent, or purpose whatsoever ; any thing herein contained to the contrary thereof in any wise notwithstanding. AND, for the considerations aforesaid, and for barring all estates-tail, and all remainders or reversions thereupon expectant or depending, if any be now subsisting and unbarred or otherwise undetermined, of and in the said capital messuage, lands, tenements, hereditaments, and premises, hereby granted and released, or mentioned to be hereby granted and released, or any of them, or any part thereof, the said Abraham Barker for himself and

No. II.

or if all die,

or if the portions
be raised,

or paid,

or secured by
the person next
in remainder ;
the residue of
the term to
cease.Condition, that
the uses and es-
tates hereby
granted shall be
void, on settling
other lands of
equal value in
recompence.Covenant to
levy a fine ;
[See statute 3 & 4
Gul. IV. c. 74.]

No. II.

in order to make
a tenant to the
præcipe, that a
recovery may
be suffered;

the said Cecilia his wife, his and her heirs, executors, and administrators, and the said John Barker for himself, his heirs, executors, and administrators, do, and each of them doth, respectively covenant, promise and grant, to and with the said David Edwards and Francis Golding, their heirs, executors, and administrators, by these presents, that they the said Abraham Barker and Cecilia his wife, and John Barker, shall and will, at the costs and charges of the said Abraham Barker, before the end of Michaelmas term next ensuing the date hereof, acknowledge and levy, before his majesty's justices of the court of Common Pleas at Westminster, one or more fine or fines, *sur cognizance de droit, come ceo, &c.* with proclamations according to the form of the statutes in that case made and provided, and the usual course of fines in such cases accustomed, unto the said David Edwards, and his heirs, of the said capital messuage, lands, tenements, hereditaments, and premises, by such apt and convenient names, quantities, qualities, number of acres and other descriptions to ascertain the same, as shall be thought meet; which said fine or fines, so as aforesaid, or in any other manner, levied and acknowledged, or to be levied and acknowledged, shall be and enure, and shall be adjudged, deemed, construed, and taken, and so are and were meant and intended, to be and enure, and are hereby declared by all the said parties to these presents to be and enure, to the use and behoof of the said David Edwards, and his heirs and assigns; to the intent and purpose that the said David Edwards may, by virtue of the said fine or fines so covenanted and agreed to be levied as aforesaid, be and become perfect tenant of the freehold of the said capital messuage, lands, tenements, hereditaments, and all other the premises, to the end that one or more good and perfect common recovery or recoveries may be thereof had and suffered, in such manner as is hereinafter for that purpose mentioned. And it is hereby declared and agreed by and between all the said parties to these presents, that it shall and may be lawful to and for the said Francis Golding, at the costs and charges of the said Abraham Barker, before the end of Michaelmas term next ensuing the date hereof, to sue forth and prosecute out of his majesty's high court of Chancery, one or more writ or writs of entry *sur disseisin en le post*, returnable before his majesty's justices of the court of Common Pleas at Westminster, thereby demanding by apt and convenient names, quantities, qualities, number of acres, and other descriptions, the said capital messuage, lands, tenements, hereditaments, and premises, against the said David Edwards; to which said writ or writs of entry, he the said David Edwards shall appear *gratis*, either in his own proper person, or by his attorney thereto lawfully authorised, and vouch over to warranty the said Abraham Barker and Cecilia his wife, and John Barker; who shall also *gratis* appear in their proper persons, or by their attorney or attornies, thereto lawfully authorised, and enter into the warranty, and vouch over to warranty the common vouchee of the

same court; who shall also appear, and after imparlance shall make default: so as judgment shall and may be thereupon had and given for the said Francis Golding, to recover the said capital messuage, lands, tenements, hereditaments, and premises, against the said David Edwards, and for him to recover in value against the said Abraham Barker and Cecilia his wife, and John Barker, and for them to recover in value against the said common vouchee, and that execution shall and may be thereupon awarded and had accordingly, and all and every other act and thing be done and executed, needful and requisite for the suffering and perfecting of such common recovery or recoveries, with vouchers as aforesaid. And it is hereby further declared and agreed by ^{to enure.} and between all the said parties to these presents, that immediately from and after the suffering and perfecting of the said recovery or recoveries, so as aforesaid, or in any other manner, or at any other time or times, suffered or to be suffered, as well these presents and the assurance hereby made, and the said fine or fines so covenanted to be levied as aforesaid, as also the said recovery or recoveries, and also all and every other fine and fines, recovery and recoveries, conveyances, and assurances in the law whatsoever heretofore had, made, levied, suffered, or executed, or hereafter to be had, made, levied, suffered, or executed, of the said capital messuage, lands, tenements, hereditaments, and premises, or any of them, or any part thereof, by and between the said parties to these presents, or any of them, or whereunto they or any of them are or shall be parties or privies, shall be and enure, and shall be adjudged, deemed, construed, and taken, and so are and were meant and intended, to be and enure, and the recoveror or recoverors in the said recovery or recoveries named or to be named, and his or their heirs, shall stand and be seised of the said capital messuage, lands, tenements, hereditaments, and premises, and of every part and parcel thereof, to the uses, upon the trusts, and to and for the intents and purposes, and under and subject to the provisoes, limitations, and agreements, herein-before mentioned, expressed, and declared, of and concerning the same. AND the said Abraham Barker, party hereunto, doth hereby, for himself, his heirs, executors, and administrators, further covenant, promise, grant and agree to and with the said David Edwards and Francis Golding, their heirs, executors, and administrators, in manner and form following; that is to say, that the said capital messuage, lands, tenements, hereditaments, and premises, shall and ^{to the preceding uses in this deed.} may at all times hereafter remain, continue, and be, to and for the uses and purposes, upon the trusts, and under and subject to the provisoes, limitations, and agreements, herein-before mentioned, expressed, and declared, of and concerning the same; and shall and may be peaceably and quietly had, held, and enjoyed accordingly, without any lawful let or interruption of or by the said Abraham Barker or Cecilia his wife, parties hereunto, his or her heirs or assigns, or of or by any other person or persons lawfully claiming or to claim from, by, or under, or in trust

Other covenants;

for quiet enjoyment,

No. II.

free from incumbrances;

and for further assurance.

Power of revocation.

for him, her, them, or any of them; or from, by, or under his or her ancestors, or any of them; and shall so remain, continue, and be, free and clear, and freely and clearly acquitted, exonerated, and discharged, or otherwise by the said Abraham Barker or Cecilia his wife, parties hereunto, his or her heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified, of, from, and against all former and other gifts, grants, bargains, sales, leases, mortgages, estates, titles, troubles, charges, and incumbrances whatsoever, had, made, done, committed, occasioned, or suffered, or to be had, made, done, committed, occasioned, or suffered, by the said Abraham Barker or Cecilia his wife, or by his or her ancestors, or any them, or by his, her, their, or any of their, act, means, assent, consent, or procurement: AND MOREOVER that he the said Abraham Barker and Cecilia his wife, parties hereunto, and his or her heirs, and all other persons having or lawfully claiming, or which shall or may have or lawfully claim, any estate, right, title, trust, or interest, at law or in equity, of, in, to, or out of, the said capital messuage, lands, tenements, hereditaments, and premises, or any of them, or any part thereof, by or under or in trust for him, her, them, or any of them, or by or under his or her ancestors or any of them, shall and will, from time to time, and at all times hereafter, upon every reasonable request, and at the costs and charges of the said David Edwards and Francis Golding, or either of them, their or either of their heirs, executors, or administrators, make, do, and execute, or cause to be made, done, and executed, all such further and other lawful and reasonable acts, deeds, conveyances, and assurances in the law whatsoever, for the further, better, more perfect, and absolute granting, conveying, settling, and assuring of the same capital messuage, lands, tenements, hereditaments, and premises, to and for the uses and purposes, upon the trusts, and under and subject to the provisoes, limitations, and agreements herein-before mentioned, expressed, and declared, of and concerning the same, as by the said David Edwards and Francis Golding, or either of them, their or either of their heirs, executors, or administrators, or their or any of their counsel learned in the law, shall be reasonably advised, devised, or required: so as such further assurances contain in them no further or other warranty, or covenants than against the person or persons, his, her, or their heirs, who shall make or do the same; and so as the party or parties who shall be requested to make such further assurances, be not compelled or compellable, for making or doing thereof, to go and travel above five miles from his, her, or their then respective dwellings, or places of abode. PROVIDED LASTLY, and it is hereby further declared and agreed by and between all the parties to these presents, that it shall and may be lawful to and for the said Abraham Barker and Cecilia his wife, John Barker and Katherine his intended wife, and David Edwards, at any time or times hereafter, during their joint lives, by any writing or writings under their respective hands and seals, and attested by two

No. II.

or more credible witnesses, to revoke, make void, alter, or change all and every or any the use and uses, estate and estates, herein and hereby before limited and declared, or mentioned or intended to be limited and declared, of and in the capital messuage, lands, tenements, hereditaments, and premises aforesaid, or of and in any part or parcel thereof, and to declare new and other uses of the same, or of any part or parcel thereof, any thing herein contained to the contrary thereof in any wise notwithstanding. IN Conclusion. WITNESS whereof the parties to these presents their hands and seals have subscribed and set, the day and year first above written.

Sealed and delivered, being	}	Abraham Barker.	(L.S.)
first duly stamped, in the		Cecilia Barker.	(L.S.)
presence of		David Edwards.	(L.S.)
George Carter.		Francis Golding.	(L.S.)
William Browne.		Charles Browne.	(L.S.)
		Richard More.	(L.S.)
		John Barker.	(L.S.)
		Katherine Edwards.	(L.S.)

No. III.

No. III.

AN OBLIGATION, OR BOND, WITH CONDITION
FOR THE PAYMENT OF MONEY.

KNOW ALL MEN by these presents, that I David Edwards of Lincoln's Inn, in the county of Middlesex, esquire, am held and firmly bound to Abraham Barker of Dale Hall in the county of Norfolk, esquire, in ten thousand pounds of lawful money of Great Britain to be paid to the said Abraham Barker, or his certain attorney, executors, administrators, or assigns; for which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal. Dated the fourth day of September in the twenty-first year of the reign of our sovereign lord George the second, by the grace of God king of Great Britain, France, and Ireland, defender of the faith, and so forth, and in the year of our Lord one thousand seven hundred and forty-seven.

THE CONDITION of this obligation is such, that if the above-bounden David Edwards, his heirs, executors, or administrators, do and shall well and truly pay, or cause to be paid, unto the above-named Abraham Barker, his executors, administrators, or assigns, the full sum of five thousand pounds of lawful British money, with lawful interest for the same, on the fourth day of March next ensuing the date of the above-written obligation, then this obligation shall be void and of none effect, or else shall be and remain in full force and virtue.

Sealed and delivered, being first	}	David Edwards. (L.S.)
duly stamped, in the presence		
of		
George Carter.		
William Browne.		

No. IV.

No. IV.

A FINE (1) OF LANDS SUR COGNIZANCE DE DROIT,
COME CEO, &c.

SECT. 1. WRIT OF COVENANT (2); OR PRÆCIPE.

GEORGE the second, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth, to the sheriff of Norfolk, greeting. COMMAND Abraham Barker, esquire, and Cecilia his wife, and John Barker, esquire, that justly and without delay they perform to David Edwards, esquire, the covenant made between them of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale; and unless they shall so do, and if the said David shall give you security of prosecuting his claim, then summon by good summoners the said Abraham, Cecilia, and John, that they appear before our justices at Westminster, from the day of St. Michael in one month, to show wherefore they have not done it: and have you there the summoners, and this writ. WITNESS ourself at Westminster the ninth day of October, in the twenty-first year of our reign.

Sheriff's return.

Pledges of } John Doe.
prosecution, } Richard Roe.

Summoners of the
within-named A-
braham, Cecilia,
and John

} John Den.
} Richard Fen.

SECT. 2. THE LICENSE TO AGREE.

Norfolk, } DAVID EDWARDS, esquire, gives to the lord
to wit. } the king ten marks, for license to agree with Abra-
ham Barker, esquire, of a plea of covenant of two messuages,
two gardens, three hundred acres of land, one hundred acres of
meadow, two hundred acres of pasture, and fifty acres of wood,
with the appurtenances, in Dale.

SECT. 3. THE CONCORD.

AND the agreement is such, to wit, that the aforesaid Abraham, Cecilia, and John have acknowledged the aforesaid tenements, with the appurtenances, to be the right of him the said David, as those which the said David hath of the gift of the aforesaid Abraham, Cecilia, and John; and those they have remised and quitted claim, from them and their heirs, to the aforesaid David, and his heirs, for ever. And further, the same Abraham, Cecilia, and John, have granted, for themselves and their heirs, that they will warrant to the aforesaid David, and his heirs, the aforesaid tenements, with the appurtenances, against all men, for ever. And for this recognition, remise, quit-claim, warranty,

(1) Fines were abolished by statute 3 & 4 Gul. IV. c. 74.

(2) Abolished by statute 3 & 4 Gul. IV. c. 27, s. 36.

fine, and agreement, the said David hath given to the said Abraham, Cecilia, and John, two hundred pounds sterling.

SECT. 4. THE NOTE OR ABSTRACT.

Norfolk, } BETWEEN David Edwards, esquire, complainant,
to wit. } and Abraham Barker, esquire, and Cecilia his wife,
and John Barker, esquire, deforciant, of two messuages, two
gardens, three hundred acres of land, one hundred acres of meadow,
two hundred acres of pasture, and fifty acres of wood, with
the appurtenances, in Dale, whereupon a plea of covenant was
summoned between them: to wit, that the said Abraham, Cecilia,
and John, have acknowledged the aforesaid tenements, with
the appurtenances, to be the right of him the said David, as
those which the said David hath of the gift of the aforesaid
Abraham, Cecilia, and John; and those they have remised and
quitted claim, from them and their heirs, to the aforesaid David
and his heirs for ever. And further, the same Abraham, Cecilia,
and John, have granted for themselves, and their heirs, that
they will warrant to the aforesaid David, and his heirs, the aforesaid
tenements, with the appurtenances, against all men, for
ever. And for this recognition, remise, quit-claim, warranty,
fine, and agreement, the said David hath given to the said Abraham,
Cecilia, and John, two hundred pounds sterling.

SECT. 5. THE FOOT, CHIROGRAPH, OR INDENTURES OF THE FINE.

Norfolk, } THIS IS THE FINAL AGREEMENT, made in the court
to wit. } of the lord the king at Westminster, from the day
of Saint Michael in one month, in the twenty-first year of the
reign of the lord George the second, by the grace of God, of
Great Britain, France, and Ireland king, defender of the faith,
and so forth, before John Willes, Thomas Abney, Thomas Burnet,
and Thomas Birch, justices, and other faithful subjects of the
lord the king then there present, between David Edwards, esquire,
complainant, and Abraham Barker, esquire, and Cecilia his wife,
and John Barker, esquire, deforciant, of two messuages, two
gardens, three hundred acres of land, one hundred acres of meadow,
two hundred acres of pasture, and fifty acres of wood, with the
appurtenances, in Dale, whereupon a plea of covenant was
summoned between them in the said court; to wit, that the
aforesaid Abraham, Cecilia, and John, have acknowledged the
aforesaid tenements, with the appurtenances, to be the right of
him the said David, as those which the said David hath of the
gift of the aforesaid Abraham, Cecilia, and John; and those they
have remised and quitted claim, from them and their heirs, to
the aforesaid David, and his heirs, for ever. And further, the
same Abraham, Cecilia, and John, have granted for themselves
and their heirs, that they will warrant to the aforesaid David
and his heirs, the aforesaid tenements, with the appurtenances,
against all men, for ever. And for this

No. IV.

recognition, remise, quit-claim, warranty, fine, and agreement, the said David hath given to the said Abraham, Cecilia, and John, two hundred pounds sterling.

SECT. 6. PROCLAMATIONS ENDORSED UPON THE FINE, ACCORDING TO THE STATUTES.

THE FIRST proclamation was made the sixteenth day of November, in the term of Saint Michael, in the twenty-first year of the king within written.

THE SECOND proclamation was made the fourth day of February, in the term of Saint Hilary, in the twenty-first year of the king within written.

THE THIRD proclamation was made the thirteenth day of May, in the term of Easter, in the twenty-first year of the king within written.

THE FOURTH proclamation was made the twenty-eighth day of June, in the term of the holy Trinity, in the twenty-second year of the king within written.

No. V.

No. V.

A COMMON RECOVERY (3) OF LANDS WITH
*DOUBLE VOUCHER.

SECT. 1. WRIT OF ENTRY SUR DISSEISIN IN THE POST; OR
PRÆCIPE.

GEORGE the second, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth, to the sheriff of Norfolk, greeting. COMMAND David Edwards, esquire, that, justly and without delay, he render to Francis Golding, clerk, two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, which he claims to be his right and inheritance, and into which the said David hath not entry, unless after the disseisin, which Hugh Hunt thereof unjustly, and without judgment, hath made to the aforesaid Francis, within thirty years now last past, as he saith, and whereupon he complains that the aforesaid David deforceth him. And unless he shall so do, and if the said Francis shall give you security of prosecuting his claim, then summon by good summoners the said David, that he appear before our justices at Westminster on the octave of Saint Martin, to show wherefore he hath not done it: and have you there the summoners, and this writ. WITNESS ourself at Westminster,

* Note, that, if the recovery be had with single voucher, the parts marked "thus" in sect. 2, are omitted.

(3) Common recoveries were abolished by statute 3 & 4 Gul. IV. c. 74.

the twenty-ninth day of October, in the twenty-first year of our reign.

No. V.

Pledges of } John Doe
prosecution, } Richard Roe.

Summoners of the }
within-named }
David,

John Den.
Richard Fen.

Sheriff's return.

SECT. 2. EXEMPLIFICATION OF THE RECOVERY ROLL.

GEORGE the second, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth, to all to whom these our present letters shall come, greeting.

KNOW YE, that among the pleas of land enrolled at Westminster, before Sir John Willes, knight, and his fellows, our justices of the bench, of the term of Saint Michael, in the twenty-first year of our reign, upon the fifty-second roll it is thus contained:

ENTRY returnable on the octave of Saint Martin. NORFOLK, to

Return.

wit: Francis Golding, clerk, in his proper person demandeth against David Edwards, esquire, two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, as his right and inheritance, and into which the said David hath not entry, unless after the disseisin which Hugh Hunt thereof unjustly, and without judgment, hath made to the aforesaid Francis, within thirty years now last past. And

Demand against the tenant.

whereupon he saith, that he himself was seised of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in time of peace, in the time of the lord the king that now is, by taking the profits thereof to the value [*of six shillings and

Count.

eight pence, and more, in rents, corn, and grass]: and into which [the said David hath not entry, unless as aforesaid]: and thereupon he bringeth suit [and good proof]. AND the said

Esplees.

David in his proper person comes and defendeth his right, when [and where it shall behove him], and thereupon voucheth to

Defence of the tenant.

warranty "John Barker, esquire; who is present here in court

Voucher.

"in his proper person, and the tenements aforesaid, with the

"Warranty.

"appurtenances to him freely warranteth [and prays that the

"said Francis may count against him]. AND hereupon the said

"Demand
"against the
"vouchee.

"Francis demandeth against the said John, tenant by his own

"warranty, the tenements aforesaid, with the appurtenances,

"in form aforesaid, &c. And whereupon he saith, that he him-

"Count.

"self was seised of the tenements aforesaid, with the appurte-

"nances, in his demesne as of fee and right, in time of peace, in

"the time of the lord the king that now is, by taking the profits

"thereof to the value, &c. And into which, &c. And there-

"upon he bringeth suit, &c. AND the aforesaid John, tenant

"Defence of the
"vouchee.

"by his own warranty, defends his right, when, &c. and there-

"upon he further voucheth to warranty" Jacob Morland;

"Second vouch-
"er.

who is present here in court in his proper person, and the tene-

Warranty.

* The clauses between hooks are no otherwise expressed in the record than by an &c.

No. V.
Demand against
the common
vouchee.
Count.

Defence of the
common vou-
chee.

Plea, *nul dissei-
sin*.

Imparlance.
Default of
the common
vouchee.

Judgment for
the demandant.
Recovery in
value.

Amercement.

Award of the
writ of seisin,
and return.

Exemplification
continued.

Teste.

ments aforesaid, with the appurtenances, to him freely war-
ranteth, &c. AND hereupon the said Francis demandeth against
the said Jacob, tenant by his own warranty, the tenements
aforesaid, with the appurtenances, in form aforesaid, &c. And
whereupon he saith, that he himself was seised of the tenements
aforesaid, with the appurtenances, in his demesne as of fee and
right, in time of peace, in the time of the lord the king that now
is, by taking the profits thereof to the value, &c. And into which,
&c. And thereupon he bringeth suit, &c. AND the aforesaid Jacob,
tenant by his own warranty, defends his right, when, &c. And
saith that the aforesaid Hugh did not disseise the aforesaid Francis
of the tenements aforesaid as the aforesaid Francis by his writ and
count aforesaid above doth suppose : and of this he puts himself
upon the country. AND the aforesaid Francis thereupon craveth
leave to imparl; and he hath it. And afterwards the aforesaid
Francis cometh again here into court, in this same term in his
proper person, and the aforesaid Jacob, though solemnly called,
cometh not again, but hath departed in contempt of the court, and
maketh default. THEREFORE IT IS CONSIDERED, that the afore-
said Francis do recover his seisin against the aforesaid David of
the tenements aforesaid, with the appurtenances : and that the
said David have of the land aforesaid "John, to the value [of the
"tenements aforesaid]; and further, that the said John have of
"the land of the said" Jacob to the value [of the tenements afore-
said]. And the said Jacob in mercy. AND hereupon the said
Francis prays a writ of the lord the king, to be directed to the
sheriff of the county aforesaid, to cause him to have full seisin of
the tenements aforesaid, with the appurtenances : and it is
granted unto him, returnable here without delay. Afterwards,
that is to say, the twenty-eighth day of November in this same
term, here cometh the said Francis in his proper person ; and the
sheriff, namely, Sir Charles Thompson, knight, now sendeth, that
he by virtue of the writ aforesaid to him directed, on the twenty-
fourth day of the same month, did cause the said Francis to have
full seisin of the tenements aforesaid with the appurtenances, as
he was commanded. ALL AND SINGULAR which premises, at the
request of the said Francis, by the tenor of these presents, we
have held good to be exemplified. In testimony whereof we
have caused our seal, appointed for sealing writs in the Bench
aforesaid, to be affixed to these presents. WITNESS Sir John
Willes, knight, at Westminster, the twenty-eighth day of No-
vember, in the twenty-first year of our reign.

COOKE.

END OF THE SECOND VOLUME.

Blackstone, William / Hovenden, John E. / Ryland, Archer

Commentaries on the laws of England in four books ; with an analysis of
the work

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